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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. .....

Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, *Petitioners*,

vs.

Aetna Life Insurance Company, a corporation, *Respondent*.

PETITION FOR *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Petitioners Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, respectfully pray certiorari to the United States Court of Appeals, Tenth Circuit, to review a decision entered in case No. 5056 in said court affirming an injunction issued by the United States District Court for the Northern District of Oklahoma, entered in case No. 3502 in which petitioners were defendants and respondent, Aetna Life Insurance Company, a corporation, was plaintiff, and denying rehearing.

(a) Opinions in the Courts Below.

The opinion delivered in the Court of Appeals (not officially reported) as well as pertinent oral statements by the United States District Court at the time of entry of the injunction complained of are appended, chronologically arranged as entered.(1)

(b) Grounds on Which the Jurisdiction of this Court Is Invoked.

The judgment and decree of the United States Court of Appeals for the Tenth Circuit and order affirming was entered August 3, 1955; by order of August 22, 1955, time to file Petition for Rehearing was extended five days; Petition for Rehearing was filed August 25, 1955, and denied September 29, 1955.

On October 11, 1955, an order of the United States Court of Appeals was entered staying mandate for a period of 30 days from that date and on the 10th day of November, 1955, said Court of Appeals ordered mandate stayed until December 26, 1955.

Jurisdiction of this Court to issue certiorari is invoked under 28 U. S. C. 1254 (1), which reads:

> "Cases in courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

---

(1) Appendix, pp. 21 to 32.

(c) The Questions Presented for Review.

The questions for review by this Court with specific reference to the statutes involved are as follows:

I. Under the Statutes of the United States (28 U. S. C., Sec. 1335 and Sec. 1397), vesting in United States District Courts original jurisdiction of civil actions in the nature of interpleader and under 28 U. S. C., Sec. 2361, providing that in any such action a district court may issue its process restraining all claimants from instituting or prosecuting any proceeding in any state court affecting the plaintiff's obligation until further order of court, which process shall be returnable at such time as the court or judge thereof directs, *may a United States District Court, or the judge thereof, on oral application and on the basis of an unverified Amendment to Complaint, and without taking any evidence or any showing of present urgency, issue an injunction, permanent in form, and not returnable at such time as the court or judge thereof directs, enjoining prosecution in a state court of competent jurisdiction of an action previously instituted against the plaintiff for the recovery of damages in a tort action at law?*

II. *Is the authority of United States District Courts to enjoin prosecution of actions in state courts of competent jurisdiction under the foregoing statutes* (28 U. S. C. 1335, 1397, and 2361) *unlimited, or governed and controlled by 28 U. S. C. 2283, which imposes restraint on power of the United States District Court to enjoin prosecution of pending actions in state courts, and by F. R. C. P. 22 and F. R. C. P. 65, which limit narrowly the conditions under which injunctions and restraining orders may be granted and specifically provide for notice, hearing and bond?*

III. *Under the statutes of the United States and Rules of Federal Procedure relating to actions in the nature of interpleader, are federal courts authorized to enjoin prosecution of tort actions for damages pending in the state courts, particularly where the maximum asserted liability of the interpleader claimant in the federal court is $162,606 and the amount of damages claimed in the state court is $462,703.88?*

(d) *Statutory Provisions and Rules of Civil Procedure Involved.*

To sustain an injunction so issued, the Court of Appeals relied upon 28 U. S. C. 1335,(1) which that court summarizes as follows:

> "28 U. S. C. A., Sec. 1335, provides that the district courts shall have original jurisdiction of civil actions of interpleader or in the nature of interpleader filed by any corporation having in its custody or possession money of the value of $500 or more, or having issued a certificate, or policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment of money of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if two or more adverse claimants, of diverse citizenship as defined in section 1332 of the title, are claiming or may claim to be entitled to such money, or to any one or more of the benefits arising by virtue of any certificate, policy, or other instrument, or arising by virtue of any such obligation, and if plaintiff has deposited in the registry of the court such money or the amount due under such obligation, there to abide the judgment of the court, or has given bond payable to the clerk in such amount and with such surety as the court or judge may deem prop-

(1) For text in full see Appendix, p. 50.

er, conditioned upon compliance by plaintiff with the future order or judgment of the court; and that such action may be entertained although the title or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

The court further relied upon 28 U. S. C., Sec. 1397, relating to venue in interpleader suits. This section reads:

"Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936."

The Court of Appeals found further authority to sustain an injunction so issued in 28 U. S. C. 2361, which reads:

"Sec. 2361. *Process and Procedure.* In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970, amended May 24, 1949, c. 139, Sec. 117, 63 Stat. 105."

Petitioners contend the foregoing statutes authorize *ex parte,* only a *temporary restraining order* "to be returnable at such time as the court or judge thereof directs"; that they require the court to "hear and determine the case."

Petitioners contend 28 U. S. C. 2361 is expressly limited by 28 U. S. C. 2283, which reads:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 23, 1948, c. 646, 62 Stat. 968."

Petitioners further contend that said injunction so issued violates the last sentence of Rule 22 of Federal Rules of Civil Procedure, which rule reads:

> "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another or, that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.
>
> "(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C., Secs. 1335, 1397, and 2361. Actions under those provisions shall be conducted in

accordance with these rules. As amended Dec. 29, 1948, effective Oct. 20, 1949."

Petitioners say further that the issuance of such injunction violates Rule 65, F. R. C. P., which provides that no preliminary injunction shall issue without notice, and that no temporary restraining order shall be granted without notice unless from specific facts shown by affidavit or verified complaint immediate and irreparable damage will result before notice can be given and requires the order to recite in detail the urgency warranting failure to give notice.(1)

Petitioners assert that while the Rules of Federal Procedure in no wise modify any statutes relating to temporary restraining orders or preliminary injunctions in actions of interpleader or in the nature of interpleader, the procedure in such actions is governed by both Rule 65 and 28 U. S. C. 2361. Otherwise that part of Rule 22 (2) which reads "Actions under those provisions (28 U. S. C., Secs. 1335, 1397 and 2361) shall be conducted in accordance with these rules," has no substance. Under no construction of either the rules or the statutes is an injunction, without notice, hearing or bond and on oral application, such as is here involved authorized.

(e) Statement of the Case.

On November 12, 1954, the United States District Court for the Northern District of Oklahoma, in the course of hearing various unrelated motions, on oral application of respondent made in open court and without other notice, evidence, hearing or bond entered an injunction, perma-

(1) For full text of Rule, see Appendix, Exhibit 15, pp. 51-53.

nent in form, enjoining the petitioners from the prosecution against Aetna of an action at law then pending in the District Court of Tulsa County, Oklahoma, as cause No. 87402, wherein damages were claimed due and payable to the executor under the will of petitioners' testatrix in the sum of $462,703.88. That the District Court of Tulsa County, Oklahoma, was a court of competent jurisdiction under the laws of the State of Oklahoma, and that said court by the filing of a petition in due form and the issuance and service of process had acquired prior jurisdiction of both the parties and the subject matter in the action there pending is nowhere disputed in the record.

Supersedeas was denied by the trial court and the injunction affirmed on appeal by the United States Court of Appeals for the Tenth Circuit.

On April 16, 1954, Aetna had instituted in the United States District Court for the Northern District of Oklahoma cause No. 3502, which it denominated an action in the nature of interpleader. Aetna asserted that on the 9th day of December, 1950, it had issued an annuity for a single premium of $162,606, payable to various beneficiaries, all of whom were made defendants, and a moiety of which annuity was, subject to certain contingencies, payable to your petitioners. Aetna charged that in case No. 29092, in the District Court of Creek County, petitioners "are claiming to be entitled to have the single premium payment of $162,606 paid back by Aetna to the estate of" petitioners' testatrix.

Aetna prayed an injunction enjoining defendants from prosecuting any pending action "for the recovery of said policy's proceeds, or any part thereof."

On the day its verified complaint was filed, Aetna had sought and obtained *ex parte* and without notice an injunc-

tive order enjoining petitioners without limit as to time from the prosecution of any action "on account of or pertaining to Policy AN 33409" issued by Aetna Life Insurance Company to petitioners' testatrix. A bond in the sum of $25,000 was approved by the Court and filed to sustain this injunction.

No reference was made in Aetna's original Complaint to the suit then pending in the State court in Tulsa County as Cause No. 87402.

On June 23, 1954, Aetna filed an unverified Amendment to Complaint for Interpleader wherein, among other allegations not material to the issue here, it alleged that petitioners here "attacked the validity of the annuity contract in case No. 87,402 * * *."

Exhibit 5 *(annexed to the amendment to complaint for interpleader) discloses that the action which had been instituted by petitioners here in the state court against Aetna and others was a suit at law for damages, actual and punitive in the sum of $462,703.88, for the tortious conversion on October 31, 1950 (before the annuity was applied for or issued), of specific, registered, United States bonds and for fraudulently causing to be placed or placing thereon an "X" purporting to be the signature of petitioners' testatrix.(1)

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(1) In the Appendix hereto, petitioners include:

Exhibit 10: Amendment to Complaint for Interpleader.

Exhibit 11: The Petition filed by petitioners in the state court, appended thereto.

Exhibit 12: The full and complete record of proceedings in the United States District Court on the day the injunction complained of was entered, and

Exhibit 13: The denominated "Order Construing Restraining Order Heretofore Made," which is the injunction herein complained of.

Such was the state of the record in the United States District Court when, on November 12, 1954, the injunction complained of herein was issued. The statements of the United States District Judge themselves show the injunction was being improvidently issued and the curt refusal to accord petitioners' counsel the courtesy or right of a hearing or so much as opportunity to examine the proposed injunction reflects the judicial atmosphere in which the proceeding was conducted.

No additional or other bond was executed than that filed before Aetna's complaint was amended.

The executor under the will of petitioners' testatrix (a party to the state court suit) was not by Aetna made a party to the suit in the federal court.

(f) Basis of Jurisdiction in the United States District Court for the Northern District of Oklahoma.

Asserted ground of federal jurisdiction in the United States District Court is diversity of citizenship between plaintiff and defendants and requisite amount in controversy.

The interpleader claim of Aetna was premised upon a theory that its obligation was either to pay the policy according to its terms or to return the premium paid. The obligation to return the premium was an obligation to the executor of the estate of petitioners' testatrix. This obligation was not an obligation due and owing to petitioners. Absent the executor, or any allegation showing his residence, jurisdiction in the federal court was not apparent on the face of the record. The executor on the face of the record was an indispensable party.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The discretionary power of the Supreme Court of the United States to issue its Writ of Certiorari under Rule 19 (b) is invoked on strong and urgent grounds of public policy. The record reveals arbitrary and unwarranted interference by a federal district judge with the lawful jurisdiction of the state court. The writ is warranted to prevent unseemly conflict between state and federal courts, and to confine the Federal District Court for the Northern District to limits established by law.

The Court of Appeals for the Tenth Circuit has so far sanctioned a departure from the accepted and usual course of proceedings by a lower court as to warrant exercise of the Supreme Court's power of supervision. It has decided a federal question in conflict with the applicable statutes of the United States and controlling Rules of Federal Procedure. Said court has decided an important question of federal law contrary to the conclusions of other circuits but which has not been and should be settled by this Court. The nature and consequences of these errors which warrant certiorari may be noted as follows:

I.

The Court of Appeals Misconstrued 28 U. S. C. 1335, 1397, and 2361.

The courts below ignored procedural provisions of 28 U. S. C. 2361. This statute does not by its terms authorize a district court to enter an injunction without notice or hearing. This section authorizes restraining "proceedings in any state * * * court * * * until further order

of court." The section requires that such order "be returnable at such time as the court or judge thereof directs" and expressly requires that such "district court shall hear and determine the case * * *."

By no logical process can this statute be construed to authorize a permanent injunction on oral application based on an unverified pleading and without notice.

In the Third Circuit it has been held that to justify the granting of a preliminary injunction there must be a showing of irreparable injury during pendency of the action. *Meiselmen Paramount Film Distribution Corp., et al.,* 180 F. 2d 94, and cases therein cited.

In the Seventh Circuit, the Court of Appeals has concluded that every order granting an injunction under the federal rules must set forth the reasons for issuance and in granting interlocutory injunction findings of fact and conclusions of law are mandatory. *Shannon, et al.,* v. *Retail Clerks, International Protective Assoc., et al.,* 128 F. 2d 553.

That court cited and relied upon *Public Service Commission* v. *Wisconsin Telephone Co.,* 289 U. S. 67, 53 S. Ct. 514, 77 L. ed. 1036, by this Court, and *National Popsicle Corporation* v. *Icyclair, Inc.,* (9th Cir.) 119 F. 2d 799.

In the Second Circuit it has been held that where affidavits on motion for preliminary injunction were vague on material issues and did not show irreparable damage would result, denial of a preliminary injunction was proper. *Huber Baking Co.* v. *Stroehmann Bros. Co., et al.,* 208 F. 2d 464.

II.

The Court of Appeals Disregarded Provisions of 28 U. S. C. 2283 and F. R. C. P. 22 and 65.

In construing and applying F. R. C. P. 22 (2), the Court of Appeals ignored that portion thereof which specifically provides that:

> "Actions under those provisions (28 U. S. C., Sections 1335, 1397, and 1361) shall be conducted in accordance with these rules."

By this proviso the Federal Rules of Civil Procedure generally were expressly made applicable to interpleader actions.

The advisory committee on rules regarding the last quoted paragraph, *supra*, said in part:

> "*By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65 (e).*"

Rule 65, F. R. C. P. (a), details the limited terms and conditions under which even temporary restraining orders may be granted, requiring notice unless specific facts are shown by affidavit or verified complaint that immediate and irreparable injury will result before notice can be served.

The rule specifically requires that every temporary restraining order procured without notice shall define the injury, state why it is irreparable, when it is returnable, and why the order was granted without notice. Restraining orders issued without notice by operation of law expire in not to exceed ten days absent certain exceptions not material here.

Failure to give defendant fair opportunity to present testimony prior to issuance of injunction and contrary to Federal Rules of Civil Procedure 52 (a) and 65 (b) was held reversible error in the Third Circuit in *Sims* v. *Greene*, 161 F. 2d 87.

In the same case that court held that notice in the federal rule prohibiting issuance of a preliminary injunction without notice implied opportunity to be heard, and that hearing required trial of issue of fact with opportunity to present evidence afforded both sides to the controversy. A preliminary injunction was held not authorized where there was not a finding that irreparable injury would result from its denial. Many like cases from other circuits are therein cited.

Where plaintiffs were not permitted to offer testimony on motion for preliminary injunction as contemplated by federal rule and as a result no findings of fact were made, failure to take evidence has been held reversible error in the Third Circuit. *City Line Center, Inc., et al.*, v. *Loew's, Inc., et al.*, 178 F. 2d 267.

Injunction Bond Jurisdictional.

The record affirmatively shows the injunction complained of was issued on oral application and without notice to petitioners, oral or written, and without evidence or bond. No pretense was made that Rule 65, F. R. C. P., was being observed in the United States District Court.

F. R. C. P. 65 expressly provides that no restraining order or preliminary injunction shall issue except upon giving security for payment of costs and damages. In the case at bar the injunction complained of was issued on the basis of allegations in the unverified Amendment to Com-

plaint filed June 23, 1954, wherein cause No. 87402, pending in the District Court of Tulsa County, was for the first and only time mentioned in any pleadings. While a $25,000 bond had been posted on April 16, 1954, to enjoin proceedings "on account of or pertaining to policy No. AN 33409 issued by Aetna * * *" no injunction had previously been issued to enjoin prosecution of this or any other suit against Aetna for damages for tort, especially a case wherein the conversion occurred and cause of action originated *before the policy was applied for or issued.*

In the Seventh Circuit, in *Chotz* v. *Freeman,* 204 F. 2d 764, the Court of Appeals held:

> "The trial court committed error in issuing the temporary restraining order without providing for security as required by Rule 65 (c) of the Federal Rules of Civil Procedure."

The Third Circuit has decided that in interpleader suits where a deposit of money was inappropriate because the money deposited represented the cash surrender value of the policy rather than the benefits payable under it and no bond was filed, the court was without jurisdiction to grant a preliminary injunction. *Edner* v. *Mass. Mut. Life Ins. Co., et al.,* 138 F. 2d 327.

The injunction herein complained of was therefore void for that it was issued without bond.

III.

Interpleader statutes and rules do not authorize federal courts to enjoin prosecution of tort actions for damages pending in the state courts.

The result of the injunction complained of is that petitioners are summarily enjoined by the federal court from

prosecuting in a state court of competent jurisdiction a suit at law for damages, actual and punitive, in the sum of $462,703.88. The procedure adopted denies them a forum in which to adjudicate their damage claim, and the right to jury trial, all without notice, hearing, or apparent cause, obviously denying them all due process of law.

28 U. S. C. 1335 vests United States District Courts with original jurisdiction of civil actions in the nature of interpleader in which "two or more adverse claimants of diverse citizenship * * * are claiming or may claim to be entitled to * * * money or property or to any one or more of the benefits arising by virtue of any certificate, policy or other instrument * * *," issued by an insurance corporation.

This section neither directly nor indirectly vests in United States District Courts power to enjoin *actions for damages* arising under a state statute for tort. Particularly is this so where it is not shown by any evidence or affidavit that the tort action has even a remote relation to benefits arising under the policy.

28 U. S. C. 2361 authorizes restraining "proceedings in any state * * * court affecting the * * * obligation involved in the interpleader action * * *." A suit to recover damages of $462,703.88 for the conversion of United States bonds on October 31, 1950, is not a suit for benefits under or affecting an annuity for $162,606 not issued until December 9, 1950, especially so in the absence of evidence.

28 U. S. C. 2283 was enacted by Congress in furtherance of an express public policy to specifically prevent needless friction between state and federal courts. *Toucey* v. *New York Life Ins. Co.*, (Iowa and Mo., 1941) 62 S. Ct. 139, 314 U. S. 118, 86 L. ed. 100, 137 A. L. R. 967; *Oklahoma Packing Co* v. *Oklahoma Gas & Electric Co.*,

(Okla., 1939) 60 S. Ct. 215, 309 U. S. 4, 84 L. ed. 537, rehearing denied 60 S. Ct. 465, 309 U. S. 693, 84 L. ed. 1034; *Hale* v. *Bimco Trading,* (Fla., 1939) 59 S. Ct. 526, 306 U. S. 375, 83 L. ed. 771; *United States* v. *Cain,* (D. C. Mich., 1947) 72 F. Supp. 897.

The section expresses the duty of "hands off" by federal courts in use of injunction to stay litigation in state courts. *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.,* (C. A. Ohio, 1954) 211 F. 2d 449.

Prohibition under this section is not voided by framing injunction against litigant rather than the state court. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* (Ohio, 1941) 61 S. Ct. 510, 312 U. S. 270, 85 L. ed. 826; *Maryland Casualty Co.* v. *Consumers Finance Service of Pa.,* (C. C. A. Pa., 1938) 101 F. 2d 514; *Georgia Power Co.* v. *Hudson,* (C. C. A., S. C., 1951) 49 F. 2d 66; *H. J. Heinz Co.* v. *Owens,* (C. A. Cal, 1951) 189 F. 2d 505, rehearing denied 191 F. 2d 257, certiorari denied 72 S. Ct. 294, 342 U. S. 905, 96 L. ed. 677, rehearing denied 72 S. Ct. 374, 342 U. S. 934, 96 L. ed. 606, among other cases

The sound public policy imposing severe restraints on the right to a restraining order or interlocutory injunction is well illustrated in an opinion of this Honorable Court by Mr. Chief Justice STONE (announced by Justice ROBERTS) in *Yakus* v. *United States,* 88 L. ed. 834, 321 U. S. 414, wherein it was concluded that even in suits in which the evidence clearly established right to a preliminary injunction, granting such relief was not strictly a matter of right, but that the court should balance the conveniences of the parties and possible injury to them and to the public. Adequacy of the amount, terms and conditions of the bond to afford protection in damages was considered material to the right to an injunction even where otherwise warranted.

In *Mallory S. S. Co.* v. *Thalheim, et al.,* 277 Fed. 196, the Second Circuit concluded that interpleader was not a remedy available to a wrongdoer to relieve it of the consequences of its wrong. The case involves specifically a claim that in interpleader the federal court might enjoin prosecution of suits for conversion to avoid multiplicity of actions. Quoting from Street's Equity Practice, Par. 429, that circuit concluded that interpleader did not authorize a court of equity to wrest jurisdiction from a court of law, and cited *Hipp* v. *Babin,* 19 How. 271, 15 L. ed. 633, by this, the Supreme Court of the United States.

The remedy of Aetna to establish in the state court, if such was the fact, that it did not convert the bonds as claimed by plaintiffs there, was plain, adequate and complete.

In *Texas* v. *Florida,* 306 U. S. 398-435, 83 L. ed. 817, this, the Supreme Court of the United States, has in substance determined that relief in the nature of interpleader is grounded upon the danger of injury because of the risk of multiple suits when the liability is single.

Obviously in the case at bar, Aetna's liability under its incontestable policy, payable to designated annuitants, is a liability wholly separate and apart from its liability to the estate of petitioner's testatrix for damages, actual and punitive, for the conversion of specified United States bonds. Aetna attempts by interpleader in the federal court to have that court assume jurisdiction to determine the merits of its defense in an action at law pending against it in the state court. Petitioners here assert that the federal court by the interpleader statutes is granted no such jurisdiction; that to recognize such jurisdiction, the federal court would, in the case at bar, deprive petitioners of any forum in which to adjudicate a major portion of their claim, particularly that portion which includes punitive damages.

Conclusion.

A diligent search fails to disclose any reported case wherein any court has decided that the interpleader statutes of the United States vest in a United States District Judge absolute and unlimited authority to enjoin, without notice, hearing, bond or a showing, oral or otherwise, of any urgency prosecution of a pending suit for damages in the state court on oral application, premised on an unverified Amendment to Complaint filed five months previously. Because of the refusal of the United States District Court to allow or permit petitioners a hearing, either in person or by counsel, no opportunity was afforded to present in the trial court any of the propositions of fact or law herein advanced.

As a result of the injunction complained of, prosecution of a suit authorized by state law in a state court of competent jurisdiction for recovery of damages in the sum of $462,703.88 has been stayed since the issuance of such injunction on November 22, 1954.

Apparently to prevent review of the proceedings on appeal, the injunction complained of was styled "Order Construing Restraining Order Heretofore Made." The so-called "Restraining Order Heretofore Made" had been entered April 16, 1954. The Amendment to Complaint, wherein cause No. 87402 was first mentioned in any pleading or any relief sought respecting it, was not filed until June 23, 1954. Obviously the United States District Court had not intended on April 16, 1954, to enjoin prosecution of a suit in the state court of which the court then had no knowledge unless from some oral representation *ex parte*. The injunction entered November 22, 1954, from which appeal was duly prosecuted, is unauthorized under the federal law, represents an abuse and misuse of judicial authority, an un-

warranted interference with the orderly administration of justice in the state courts, and promotes unseemly conflict between state and federal courts contrary to a sound public policy.

For the reasons stated, it is respectfully submitted that certiorari should issue.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

GLENN A. YOUNG,
DAVID YOUNG,
JOHN W. YOUNG, and
H. K. GLUNT,
Of Counsel.

APPENDIX.

EXHIBIT 1.

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

May Term—1955.

Filed, United States Court of Appeals, Tenth Circuit, Aug. 3, 1955; Robert B. Cartwright, Clerk.

Number 5056.

Leona Holcomb, individually; Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, Appellants *vs.* Aetna Life Insurance Company, a corporation, Appellee.

Appeal From the District Court of the United States for the Northern District of Oklahoma.

Glenn O. Young and Glenn A. Young (H. K. Glunt, David Young and John W. Young were with them on the brief) for Appellants Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Ed Denham and Frank Denham.

Glenn O. Young and Glenn A. Young (John W. Young and David Young were with them on the brief) for Appellants George Denham, Clarence Denham, and Mary Jane Hopkins.

Robert J. Woolsey (Farmer, Woolsey, Flippo & Bailey, J. C. Farmer, Otho Flippo, and J. B. Bailey were with him on the brief) for Appellees.

Before BRATTON and MURRAH, Circuit Judges, and WALLACE, District Judge.

BRATTON, Circuit Judge:

This action in the nature of interpleader was instituted

in the United States Court for Northern Oklahoma by Aetna Life Insurance Company, sometimes hereinafter referred to as Aetna, against Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Leona Denham Holcomb, Frank T. Denham, Edward Denham, Clarence M. Denham,George N. Denham, Rufus Denham, Marion Denham, Lewis Denham, Marion Rettenmeyer, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, Mary Jane Hopkins, and Ellen Cash.

It is alleged in the complaint and the amendment thereto, considered as a single pleading, that plaintiff is a corporation organized under the laws of Connecticut; that the defendants Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Edward Denham, Frank T. Denham, George N. Denham, Leona Denham Holcomb, and Mary Jane Hopkins are residents and citizens of Oklahoma; that the remaining defendants are residents and citizens of states other than Connecticut and Oklahoma; that more than $3,000 exclusive of interest and costs is in controversy; and that the defendants who are residents and citizens of Oklahoma, on one hand, claim adversely to those who are residents and citizens of other states, on the other hand. It is further alleged that plaintiff is engaged in the insurance business; that it entered into a contract of annuity insurance with Rosa B. Wright Rettenmeyer, for which the annuitant paid a premium of $162,606; that by the terms of such contract of insurance, plaintiff was to pay to Rosa B. Wright Rettenmeyer $1,000 per month during the remainder of her life; that upon her death, plaintiff was to pay $1,000 per month to her husband, Joseph A. Rettenmeyer; and that upon the death of Joseph A. Rettenmeyer, plaintiff was to pay to Rufus Denham, Marion Denham, Lewis Denham, Marion Rettenmeyer, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, and Ellen Cash, each $123.07 monthly, and pay to Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, and Mary Jane

Hopkins, each $23.08 monthly, until the amount paid should equal the amount of the premium. It was further alleged that Rosa B. Wright Rettenmeyer died testate; that her will was admitted to probate in the County Court of Creek County, Oklahoma; that First National Bank & Trust Company of Oklahoma City, Oklahoma, sometimes hereinafter referred to as the Bank, was appointed executor; and that Joseph A. Rettenmeyer died. It is further alleged that in the probate proceeding involving the estate of Rosa B. Wright Rettenmeyer, deceased, Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham, Clarence Denham, and Mary Jane Hopkins, filed a pleading in the nature of a petition in intervention in which they attacked the validity of the contract of annuity insurance and sought for the benefit of the estate to recover as against Aetna and the Bank the $162,606 which had been paid as a premium thereon; that the parties thus intervening in the probate proceeding filed in the District Court of Creek County, Cause No. 29092 against Aetna, the Bank, and others; that the same complaining parties instituted in the District Court for Tulsa County, Oklahoma, Cause No. 87402 against Aetna, the Bank, and others; that in both cases then pending in the state district courts, the complainants attacked the validity of the contract of annuity insurance and sought to recover for the benefit of the estate of Rosa B. Wright Rettenmeyer the amount of the premium paid for such contract; that the contract of annuity insurance was purchased by Rosa B. Wright Rettenmeyer with the proceeds of the United States bonds mentioned and referred to in the petition in the case in the District Court of Creek County; and that payments in the aggregate amount of $39,000 were made under the contract of annuity insurance to Rosa B. Rettenmeyer or to her duly appointed guardian during her life and to Joseph B. Rettenmeyer after her death. It is further alleged that the beneficiaries named in the contract of annuity insurance who are not parties to Cause No. 29092 and Cause No. 87402, namely Raymond D.

Rettenmeyer, Frank X. Rettenmeyer, Lewis Denham, Marion Denham, Rufus Denham, and Ellen Cash, are claiming and may claim to be entitled to the monthly payments as provided in such contract of insurance after the death of Joseph A. Rettenmeyer; that by reason of such divergent claims a conflict has arisen as to which of the defendants are entitled to payment of their respective claims; and that plaintiff has been and may be subjected to vexatious and multitudinous suits and be further subjected to multiple payments in the event all of the defendants should prevail upon their claims against plaintiff. A copy of an order entered by the county court declining to direct the executor to take steps to recover for the estate the amount which had been paid as the premium on the contract of annuity insurance, copies of the petition and the amended petition in Cause No. 29092, and a copy of the petition in Cause No. 87402, are attached to the complaint and made parts thereof. The prayer of the complaint is that the defendants be restrained from instituting any action against plaintiff, or from prosecuting any pending action or actions against plaintiff, for the recovery of the proceeds of the contract of annuity insurance, or any part thereof, until the further order of the court; that the defendants be required to interplead and settle among themselves their rights to the amount of such contract of insurance; that plaintiff be discharged from all liability in the premises except to the person whom the court should adjudge entitled to the amount of such contract of insurance; and that plaintiff have all other equitable relief to which it was entitled.

The court entered an order restraining and enjoining the defendants from instituting or prosecuting further any suit in a state court, and from instituting or prosecuting any suit or proceeding in any United States Court, on account of or pertaining to the contract of annuity insurance, reserving unto the defendants however the right to appear in this cause and assert any claim which they may have. Motions were filed to vacate the injunctive order, to strike certain parts of the complaint, and to dismiss the action.

And answers were filed. The court entered an order vacating the temporary restraining order previously entered in so far as it restrained any judicial proceedings or actions of any kind against any one except Aetna. In all other respects, the motions were denied. The court entered a third order. It recited that confusion had arisen in respect to the two previously entered orders. And it provided among other things that in order to clarify and construe such previously entered orders, the defendants were restrained and enjoined as against Aetna from instituting or further prosecuting any suit or proceeding on account of or pertaining to the contract of annuity insurance, including particularly Cause No. 29092, pending in the District Court of Creek County, and Cause No. 87402 pending in the District Court of Tulsa County. The defendants Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, and Mary Jane Hopkins, appealed. The defendants Rufus Denham, Lewis Denham, Marion Denham, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, and Ellen Cash did not appeal.

The order appealed from is challenged on the ground that the issuance of the injunction constituted a violation of 28 U. S. C. A., Sec. 2283, which provides that a court of the United States may not grant an injunction to stay a proceeding in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect and effectuate its judgments. The statute embodies the long standing wholesome policy of avoiding needless friction between state and federal courts. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4; *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118; *Porter* v. *Dicken*, 328 U. S. 252. But it is to be observed that the interdiction contained in the statute upon the power of a court of the United States in respect to the issuance of an injunction is not absolute and without exception. The statute contains three separate and distinct exceptions from

its sweep. One of such exceptions is instances in which Congress has expressly authorized the granting of an injunction to restrain parties from prosecuting a proceeding in a state court. In virtue of such exception, the statute does not forbid the issuance of an injunction to restrain the prosecution of an action in a state court where its issuance has been expressly authorized by Act of Congress.

While denominated an order construing the restraining orders previously entered in the case, the effect of the order in question is to enjoin the defendants from further prosecuting as against Aetna two specified and particularized cases pending in state courts. And entry of the order is forbidden by 28 U. S. C. A., Sec. 2283, unless it is an order falling within the purview of an authorizing Act of Congress. It therefore becomes appropriate to inquire whether the order does fall within the scope and meaning of an Act of Congress authorizing its issuance. In approaching the inquiry, attention must be focused upon two statutes. In presently pertinent part, 28 U. S. C. A., Sec. 1335, provides that the district courts shall have original jurisdiction of civil actions of interpleader or in the nature of interpleader filed by any corporation having in its custody or possession money of the value of $500 or more, or having issued a certificate, or policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment of money of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if two or more adverse claimants, of diverse citizenship as defined in Section 1332 of the title, are claiming or may claim to be entitled to such money, or to any one or more of the benefits arising by virtue of any certificate, policy, or other instrument, or arising by virtue of any such obligation, and if plaintiff has deposited in the registry of the court such money or the amount due under such obligation, there to abide the judgment of the court, or has given bond payable to the clerk in such amount and with such surety as the court or judge may deem proper, conditioned upon compliance by plaintiff with the future order or judg-

ment of the court; and that such action may be entertained although the title or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. And in presently pertinent part, 28 U. S. C. A., Sec. 2361, provides that in any civil action of interpleader or in the nature of interpleader under Section 1335 of the title, the district court may enter its order restraining the defendants from prosecuting any proceeding in any state court affecting the property, instrument, or obligation involved in the interpleader action until the further order of the court. The order, entered in an action in the nature of interpleader, is one expressly authorized by Act of Congress and therefore does not contravene 28 U. S. C. A., Sec. 2283.

It is urged that the trial court was without jurisdiction of the cause and hence the restraining order in question is infirm for the reason that there is no identity of property, instrument, or obligation between the conversion actions in the state courts and this action in the nature of interpleader. The argument is that the two actions in the state court are straight suits for conversion of United States bonds; that no reference is made in the amended petition in the action in the District Court of Creek County, or in the original petition in the action in the District Court of Tulsa County, to the contract of insurance or to the premium paid therefor; and that therefore there is complete want of identity of property, instrument, or obligation between such suits and this action. The further argument is that since the contract of insurance contained an incontestable provision, the outcome of the cases in the state courts and the obligation of Aetna under the contract of insurance are wholly unrelated matters. It is said that whether Aetna prevails or loses in the state court, it still must make payments under the contract of insurance; and that therefore Aetna is not being subjected to vexatious and multitudinous claims. Rule of Civil Procedure 22, 28 U. S. C., provides that persons having claims against plaintiff may be joined as defendants and required to interplead when their claims are such that plaintiff

is or may be exposed to double or multiple liability; that it is not ground for objection to the joinder that the claims of the several claimants do not have a common origin or are not identical but are adverse and independent of each other, or that plaintiff avers that he is not liable in whole or in part to any or all of the claimants; and that the remedy therein provided is in addition to and in no way supersedes or limits the remedy provided by 28 U. S. C. A., Secs. 1335, 1397, and 2361. The substance of the cause of action pleaded in the complaint in this case is that the premium which Aetna received for the contract of insurance was paid with the proceeds of certain United States bonds; that in each of the cases pending in the state courts plaintiffs—being part of the defendants here—pleaded that certain United States bonds were wrongfully converted from Rosa B. Wright Rettenmeyer; that the bonds from which the proceeds were used to pay the premium on the contract of insurance and the bonds referred to in the actions in the state courts are the same bonds; and that in the event plaintiffs should prevail in the state courts and the annuitants under the contract of insurance who are not parties to the actions in the state courts should also prevail upon their claims for benefits under the contract of insurance, Aetna will be subjected to double payment for a single liability. Stated otherwise, the cause of action as pleaded in the complaint is that two claims are being asserted against Aetna; and that in the event both are pressed with success, Aetna will be compelled to make double payment in connection with a single liability. If plaintiffs should prevail in either action in the state court, the effect will be to require or compel Aetna to part with the premium which it received for the contract of insurance. And in the event that after parting with such premium, Aetna should be compelled to make or continue to make payments to annuitants under the contract of insurance, it will be subjected to multiple payments. If Aetna is under only a single liability, the claim asserted against it in the state courts and the claim of annuitants for payment or continued payment of specified sums under the terms of the

contract of insurance necessarily in contemplation of law negate each other and are adverse each to the other. The two claims being asserted against Aetna are not completely unrelated to each other in the sense that they may not be pleaded as the basis for equitable relief in the nature of interpleader. And whether Aetna is under only a single liability, whether the requirement in effect that it surrender back or part with the premium which it received for the contract of insurance would operate to terminate or extinguish such contract with no further liability on the part of Aetna to make payments to annuitants, whether Aetna is being and will be subjected to vexatious claims which negate each other, and whether it is in danger of being compelled to make multiple payments in connection with a single liability, are questions which cannot be adjudicated with finality and conclusiveness as to all parties in interest in either of the cases pending in the state courts. They are justiciable questions appropriate for determination in an action in the nature of interpleader. *Texas* v. *Florida,* 306 U. S. 398; *Standard Surety & Casualty Co.* v. *Baker,* 105 F. (2d) 578; *Equitable Life Assurance Society of the United Sates* v. *Maloney.* 85 F. Supp. 212.

Another contention presented is that the injunction should be vacated because appellants cannot make their claim of conversion in this action in the absence of the executor of the estate of Rosa B. Wright Rettenmeyer, a co-citizen of appellants whose joinder would defeat jurisdiction. In the two actions in the state courts, the Bank was sued both as a banking corporation and as executor of the estate of Rosa B. Wright Rettenmeyer. The Bank, as a corporation, filed in this action in the nature of interpleader its motion for leave to intervene together with a tendered complaint in intervention. But in filing the motion and tendering the complaint, the Bank acted only in its capacity as a banking corporation. It did not purport to act in its capacity as executor. But the presence of the Bank as executor is not essential to the jurisdiction of the court. Aetna is a

party. The liability for conversion asserted against Aetna in the state courts is joint and several. And that liability may be asserted against Aetna in this action without the Bank as executor being a party. We fail to perceive that the absence of the Bank in its capacity as executor as a party to the action constitutes any impediment to the jurisdiction of the court.

Two further contentions advanced for reversal of the order may be considered together. One is that the action in the nature of interpleader is governed by equitable principles; that Aetna stands in the position of a joint tort feasor; that it does not come into court with clean hands; and that equity will not extend relief to a joint tort feasor against the consequences of its own wrong. The other is that the injunction should be vacated because Aetna is not acting in good faith in seeking the interpleader in which the injunction was issued. A proceeding in the nature of interpleader is one in equity and is governed by equitable principles. *Texas* v. *Florida, supra.* A tort feasor cannot obtain protection in an action in the nature of interpleader against the consequences of its own wrong. *Mallory Steamship Co.* v. *Thalheim,* 277 F. 196. And a complainant in an action in the nature of interpleader must act in good faith. But the facts pleaded in the complaint do not disclose a tort on the part of Aetna. Neither does the complaint disclose on its face any lack of good faith on the part of Aetna in instituting the action. While the position of the appealing defendants has been throughout that Aetna converted or participated in the conversion of the bonds belonging to Rosa B. Wright Rettenmeyer and that it has not acted in good faith in instituting the action, the cause has not been tried and there has not been a finding or determination of tort on the part of Aetna or any lack of good faith on its part in the institution of the action. And unless or until such issues have been tried, the contentions presently presented on appeal are premature.

Next comes the contention that the injunction should be vacated because Aetna made no bond for its issuance and did not deposit the amount of the pretended res which it alleges to be the subject of the hypothetical controversy, and that it secured the injunction without notice, hearing, or evidence, in violation of due process. Aetna submitted a bond in the sum of $25,000, conditioned as required by 28 U. S. C. A., Sec. 1335. The record before us does not indicate that any order was entered in advance fixing the amount of the bond. But the court approved the tendered bond, and that approval brought within its operative scope approval of the amount and adequacy of the bond and the sufficiency of the surety subscribing thereto. The order appealed from was entered long after the filing of the bond, and no new or additional bond was filed as a prerequisite to the entry of such order. But the filing of a new bond was not necessary. The defendants may have resort to the bond on file for any damage up to the amount of such bond which they may suffer in consequence of the improvident entry of the restraining order from which the appeal was perfected. Rule of Civil Procedure 65, 28 U. S. C., provides in part that no preliminary injunction shall be issued without notice to the adverse party; and that no temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. And it further provides among other things that the rules do not modify the provisions of 28 U. S. C., Sec. 2361, relating to preliminary injunctions in actions in the nature of interpleader. No written notice was given in advance of the entry of the order from which the appeal was taken. But the appealing defendants had appeared and pleaded in the case, and they were advised in open court that the order would be entered. Entry of the order in such circumstances did not contravene Rule 65, *supra*, or the exactions of due process.

The remaining contention which merits discussion is that the court abused its discretion in enjoining the defendants from prosecuting the two cases in the state courts. Judicial discretion in a case of this kind is the power exercised by the court to determine a question to which no strict rule of equity is applicable. It is a vested power not exercised in an arbitrary, capricious, or willful manner but with due regard for that which is equitable and just under the circumstances. It is action directed by the court's reason and conscience to a just result. *Smaldone* v. *United States,* 211 F. 2d 161. And whether action constitutes an abuse of discretion depends upon the particular circumstances. Viewing the contention in the light of these blueprinted general principles, we are unable to say that restraining the defendants until the further order of the court from prosecuting the actions in the state courts constituted an abuse of discretion. On the contrary, we share the view that entry of the restraining order lay within the range of discretion of the trial court.

Other contentions are presented. We have examined them and think they are without merit.

The order from which the appeal was perfected is AFFIRMED.

EXHIBIT 2.

Judgment of the United States Court of Appeals.

"Forty-third day, May Term, Wednesday, August 3rd, 1955.

Before Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed " (Tr. 19)

EXHIBIT 3.

Order of the United States Court of Appeals.

"(By order of August 22, 1955, time for appellants' petition for rehearing was extended for an additional five days.)" (Tr. 19)

EXHIBIT 4.

Petition of Appellants for Rehearing.

"Filed United States Court of Appeals, Tenth Circuit, Aug. 25, 1955; Robert B. Cartwright, Clerk."

EXHIBIT 5.

Order of the United States Court of Appeals.

"(By order of September 6, 1955, leave was granted to file an amendment to appellants' petition for rehearing within ten days.)" (Tr. 48)

EXHIBIT 6.

Amendment to Petition for Rehearing.

"Filed United States Court of Appeals, Tenth Circuit, Sep. 14, 1955; Robert B. Cartwright, Clerk."

EXHIBIT 7.

Order: Appellants' Petition for Rehearing and Amendment—Denied.

"Thirteenth day, September term, Thursday, September 29th, 1955.

Before Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges, and Honorable W. R. Wallace, District Court.

This cause came on to be heard on the petition of appellants for a rehearing herein and amendment thereto and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition and amendment thereto be and the same are hereby denied." (Tr. 65)

EXHIBIT 8.

Order of the United States Court of Appeals.

"(On October 11, 1955, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days from that day, under provision of paragraph 3 of rule 28 of said court.)" (Tr. 65)

EXHIBIT 9.

Order of November 10, 1955, of the United States Court of Appeals.

"This cause came on to be heard on the motion of appellants for a further stay of the mandate herein.

"On consideration whereof, it is now here ordered that said motion be and the same is hereby granted and that no mandate of this court issue herein on or before December 26, 1955, and that, if within said period of time there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court." (Tr. 67)

EXHIBIT 10.

Amendment to Complaint for Interpleader.

"Comes now the plaintiff and with leave of court having been obtained amends its original complaint for interpleader filed herein and alleges and states:

1. That the annuity contract mentioned in its original complaint, No. AN 33409 attached to the complaint as Exhibit "1," was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of the United States Government bonds mentioned in paragraph 13 of the amended petition filed by Leona Holcomb, *et al.*, in Case No. 29092 in the District Court of Creek County and mentioned in paragraph 14 in the original petition filed by the plaintiff Leona Holcomb, *et al.*, in Case No. 29092.

2. That the said Rosa B. Wright Rettenmeyer signed the application for said insurance and was competent when she signed said application and specified the terms and provisions of said annuity contract and that thereafter she ratified said contract by accepting the annuity payments during her lifetime and prior to the date she was adjudicated incompetent; that after she was adjudged incompetent payments were then made to her duly authorized and appointed guardian of her estate and then on her death payments were made to Joe Rettenmeyer; and that the sum total of all of said payments amounts to the sum of $39,000.

3. Plaintiff alleges further that Leona Holcomb, individually; Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Ed Denham, Frank Denham, George Denham and Clarence Denham and Mary Jane Hopkins have attached the validity of said annuity contract, not only as alleged in the complaint in interpleader filed herein but also in Case No. 6442 in the County Court of Creek County, In the Matter of the Estate of Rosa B. Wright Rettenmeyer, the said defendants have challenged the validity of said contract; in said cause the said Leona Holcomb and the other above named defendants filed on September 4, 1953, a complaint in intervention, a response to application and complaints for citations, in which they allege as follows:

That notwithstanding the express terms of said antenuptial contract and the terms of said will made while said Rosa B. Wright was possessed of all her mental and physical faculties, after she had become paralyzed and physically and mentally incapacitated by an extensive cerebral hemorrhage, said Joseph A. Rettenmeyer procured from her separate funds one annuity contract ostensibly to Donald George Fleming, a minor, but in which said Joseph A. Rettenmeyer holds for life the right to surrender the same for cash, in the face amount of $33,000. Within a month after procuring this first annuity contract with her funds, and while she was still so incapacitated, said Joseph A. Retten-

meyer secured another annuity contract in the face amount of $162,000, paying to him, the said Joseph A. Rettenmeyer, $1,000 per month. That both such instruments were secured while said Joseph A. Rettenmeyer was acting as and legally obligated to perform the duties and maintain the loyalty of the agent, attorney and fiduciary of Rosa B. Wright."

Further that in said complaint in intervention it was alleged in the prayer for relief as follows:

"3. That after said Joseph A. Rettenmeyer has made disclosure of all additional available evidence concerning the things and matters related in this response and complaint and in executor's application be thoroughly investigated under oath and said executor ordered to institute suit as requested by respondents and complainants and that said executor make additional items of inventory and where necessary bring suit to recover all omitted property belonging to said estate including moneys expended for the bonds and annuity contracts specified in said executor's application, the property omitted from the final account of the guardian of the estate of Rosa B. Wright Rettenmeyer, deceased, and all moneys or property secured or sought by said Joseph A. Rettenmeyer in violation of the afore described ante-nuptial contract and the last will and testament and codicils made thereunder and all personal gains by him made in breach of his fiduciary relationship to said decedent."

4. Plaintiffs allege further that in said cause No. 6442 the said Leona Holcomb and the others heretofore named again attacked the validity of said annuity contract No. AN 33409 by filing on September 21, 1953, in said County Court of Creek County an amended complaint in intervention, amended response to application, and complaints for citation; that in said amended complaint in intervention it was alleged as follows:

"That notwithstanding the express terms of said ante-nuptial contract and the terms of said will made while the said Rosa B. Wright was possessed of all her mental and

physical faculties, after she had become paralyzed and physically and mentally incapacitated by an extensive cerebral hemorrhage, said Joseph A. Rettenmeyer procured from her separate funds one annuity contract ostensibly to Donald George Fleming, a minor, but in which said Joseph A. Rettenmeyer holds for life the right to surrender the same for cash, in the face amount of $33,000. Within a month after procuring this first annuity contract with her funds, and while she was still so incapacitated, said Joseph A. Rettenmeyer secured another annuity contract in the face amount of $162,000 paying to him, the said Joseph A. Rettenmeyer, $1,000 per month. That both such instruments were secured while said Joseph A. Rettenmeyer was acting as and legally obligated to perform the duties and maintain the loyalty of the agent, attorney and fiduciary of said Rosa B. Wright."

In said amended complaint in intervention the said Leona Holcomb and the above named defendants requested and prayed among other things that the executor, First National Bank and Trust Company of Oklahoma City, immediately commence suit to recover the foregoing assets and unless same was done that the executor be discharged without compensation and a new administrator with will annexed be appointed.

5. Plaintiff alleges that the said Leona Holcomb, *et al.*, again attacked the validity of annuity contract in Case No. 87402 in the District Court of Tulsa County, State of Oklahoma, styled Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.;* a copy of said petition filed in the District Court of Tulsa County is hereto attached, marked Plaintiff's Exhibit '5.'

Wherefore, plaintiff prays judgment in accordance with the prayer for relief in its original complaint filed herein.

J. C. Farmer,
R. J. Woolsey,
Otto Flippo,
J. B. Bailey.

Filed with exhibits June 23, 1954."

EXHIBIT 11.

Exhibit 5 to Amendment to Complaint for Interpleader.

PETITION. (Caption and signature omitted.)

Come now the plaintiffs, Mary Jane Hopkins, *nee* Wright, Leona Holcomb, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham, and for cause of action against the defendants Aetna Life Insurance Company, F. E. Pence, Joseph A. Rettenmeyer, in person and as guardian, agent, and attorney in fact for Rosa B. Wright, later Rettenmeyer, deceased, Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, a corporation, as such and as Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, and its officers and agents, Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, allege and state:

I. The plaintiff Mary Jane Hopkins, *nee* Wright, is the daughter of the said Rosa B. Wright (later Rettenmeyer). That plaintiffs Leona Holcomb, *nee* Denham, Ed, Frank, George and Clarence Denham were brought up in the home of the late Rosa B. Wright (later Rettenmeyer) and her husband, the late Cal Wright, both of whom are deceased. Rosa B. Wright was their aunt and foster mother. Donald George Fleming, a minor, is the ward of said Rosa B. Wright and her grand nephew. Said plaintiffs hereinafter referred to as The Denham Heirs are all devisees under the Last Will and Testament of Rosa B. Wright Rettenmeyer, deceased, attached hereto and made a part hereof as "Exhibit A."

II. The defendant, The First National Bank and Trust Company of Oklahoma City, is a corporation duly organized and existing as such under the laws of the State of Oklahoma, engaged in general banking and in business as trustee and custodian for hire of the property of others, including the public generally. Said The First National Bank and Trust Company of Oklahoma City, in addition to its

activities hereinabove recited, advertises for business as and represents itself to be specially qualified to serve as administrator of the estate of deceased persons and executor of their wills. For the purpose of obtaining business of this character it retains and employs attorneys and agents who solicit and attempt to obtain for it appointments involving fidelity and trust as executors and administrators. At all times hereinafter complained of, said defendant The First National Bank and Trust Company of Oklahoma City was the duly designated Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, under the terms and conditions of her said Last Will and Testament. Subsequent to the death of Rosa B. Wright Rettenmeyer, said The First National Bank and Trust Company of Oklahoma City was by order of the County Court of Creek County, Oklahoma, in a proceeding therein instituted by it, designated and appointed executor of the will of said Rosa B. Wright Rettenmeyer, deceased, which position of trust said corporation now occupies. A copy of said Letters Testamentary are hereto attached as a part hereof and marked "Exhibit B."

III. The defendants Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, were at all times hereinafter complained of officers and agents of said The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such and as the designated Executor of the Estate of Rosa B. Wright, later Rettenmeyer, deceased; that they were at all times herein referred to acting within the scope of their employment as such officers and agents and their acts were the acts of said corporation, The First National Bank and Trust Company of Oklahoma City.

IV. That at all times hereinafter complained of one Joseph A. Rettenmeyer was the second husband, attorney in fact, agent and/or guardian of the aforesaid Rosa B. Wright (later Rettenmeyer) and a devisee under the terms of her aforesaid Last Will and Testament to the extent of an undivided one-eleventh interest in her estate. Said

Joseph A. Rettenmeyer was the step-father of plaintiff Mary Jane Hopkins, *nee* Wright. At all times hereinafter complained of and in committing the torts and converting the property hereinafter set forth, said Joseph A. Rettenmeyer acted in his own behalf and in behalf of and for his own children by another marriage, defendants Francis X. Rettenmeyer and Raymond Rettenmeyer, and his daughter-in-law defendant Marion Rettenmeyer; and said last named three defendants at all such times acted by and through said Joseph A. Rettenmeyer.

Copies of the three powers of attorney and the Letters of Guardianship under and behind which said defendant Joseph A. Rettenmeyer so acted and converted the property of said Rosa B. Wright are attached hereto as a part hereof and marked "Exhibits C, D, E, and F," respectively.

V. That the defendant Aetna Life Insurance Company is a foreign insurance company, duly incorporated as such and engaged in business in the State of Oklahoma. That the defendant F. E. Pence is and was at all times hereinafter complained of an agent of said Aetna Life Insurance Company, occupying a position as General Agent of said company within and for the State of Oklahoma and acting within the terms and scope of his agency as such; that said F. E. Pence had long posed as a personal friend and private counsellor to said Rosa B. Wright (later Rettenmeyer).

VII. Plaintiffs aver further that upon the death of her first husband, the aforesaid Cal Wright, his widow, the aforesaid Rosa B. Wright (later Rettenmeyer) inherited under the terms of his Last Will and Testament an estate having a value in excess of $800,000.00. At about the time said estate was distributed to her, the defendant Joseph A. Rettenmeyer proposed to marry her; that since the said Joseph A. Rettenmeyer was then about 68 years old and the said Rosa B. Wright was then herself about 67 years, she, the said Rosa B. Wright, fearing his object to be her property rather than her affections, required said Joseph A. Rettenmeyer to make and execute an ante-nuptial agreement, a

true and correct copy of which is hereto annexed and made a part hereof as "Exhibit G," under and by virtue of the terms of which he solemnly and legally renounced and waived any claims to her property and estate growing out of or resulting from said marriage; that she thereafter made and executed in due form the Will heretofore set forth as Exhibit A, making ample provision for the said Joseph A. Rettenmeyer in the event of her death by devising to him as aforesaid an undivided one-eleventh of her estate, and devising to plaintiffs a just and equitable portion thereof, all as is more particularly set forth under the terms of said Will; plaintiffs further allege that certain codicils were thereafter executed to said Will, the same being identified as Exhibits H and I and made a part hereof. That neither of said codicils altered or modified the proportionate share and part of said estate devised to each devisee.

VIII. That subsequent to the execution of said antenuptial agreement and said Will and said codicils, and prior to her death, the said Rosa B. Wright (later Rettenmeyer) became incompetent and incapable as the result of weakness of mind and body of seeing after and attending to her own property and affairs; that as the result thereof she was obliged to and did make and execute in favor of said Joseph A. Rettenmeyer certain Powers of Attorneys, copies of which are heretofore appended as Exhibits C, D and E, under and by virtue of the terms of which she turned over and delivered to him, subject to the limitations and restrictions therein set forth, control of her property and estate; that thereafter and on or about the 30th day of July, 1952, said Joseph A. Rettenmeyer instituted in the County Court of Creek County, Oklahoma, a proceeding to have said Rosa B. Wright (Rettenmeyer) adjudged incompetent, and to have himself made guardian of her person and estate; that a copy of the petition therein is hereto appended as a part hereof as Exhibit J; that under an order of the County Court of Creek County, a copy of which is hereto appended and made part hereof as Exhibit K, he was designated and appointed

her guardian, and as such assumed direction and control over her person under Letters of Guardianship, a copy of which is appended as a part hereof as Exhibit F.

IX. Plaintiffs allege further that said ante-nuptial agreement and said Will and all codicils thereto were prepared by or under the direction of an attorney, to-wit, John Embry, who was attorney for the late Rosa B. Wright (later Rettenmeyer), and in whom she reposed special confidence and trust, and by members of the law firm with which he was associated, that is to say, the law firm of Embry, Johnson, Crowe, Tolbert and Boxley; plaintiffs further say that said attorneys and said law firm were attorneys also for defendant Aetna Life Insurance Company, F. E. Pence and Joseph A. Rettenmeyer as agent of Rosa B. Wright (later Rettenmeyer) under the terms of the agency hereinabove referred to.

X. Plaintiffs say further that at the time of the appointment of said Joseph A. Rettenmeyer as Attorney in Fact, agent and custodian of her property aforesaid, said Rosa B. Wright (later Rettenmeyer) owned and held U. S. Government Bonds, more particularly described as follows:

U. S. Treasury Bonds 2-7/8ths—1955-1960.

No. 10065 E	$10,000.00
No. 10066 F	$10,000.00
No. 10067 H	$10,000.00
No. 10068 J	$10,000.00
No. 10069 K	$10,000.00
No. 10070 L	$10,000.00
No. 10071 A	$10,000.00
No. 10072 B	$10,000.00
No. 10073 C	$10,000.00
No. 10074 D	$10,000.00
No. 10075 E	$10,000.00
No. 10076 F	$10,000.00
No. 8730 L	$ 5,000.00

Series G, June, 1944:

No. X448354 G	$10,000.00
No. X448355 G	$10,000.00
No. X448356 G	$10,000.00
No. X448357 G	$10,000.00
No. X448358 G	$10,000.00
No. X448359 G	$10,000.00

Said bonds had been by her entrusted to the care and custody of the defendant The First National Bank and Trust Company, a corporation, and its officers and agents, defendants Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, both in the capacity of trustees for hire and as the designated Executor of the Will of said decedent. Said bonds had a market value of $191,864.64, and were producing interest, which was accruing to her use and benefit in the sum of $8,687.50 per year.

XI. Plaintiffs aver and allege that under the terms of the Will of the late Rosa B. Wright (later Rettenmeyer) and said Ante-nuptial agreement hereinabove referred to, in the event of the death of the said Rosa B. Wright said bonds, or the value thereof, together with any unexpended portion of the increments and the profits therefrom, would have been divided one-eleventh to Joseph A. Rettenmeyer and seven-elevenths to the plaintiffs herein, conformable to the terms of the Will and codicils hereinabove referred to. Plaintiffs aver and state that all said defendants and the attorneys hereinabove referred to were fully informed of the facts and circumstances herein set forth.

XII. It was the duty of each of the defendants hereinabove named to preserve intact and with fidelity and care said property and the income and increment therefrom for the use and benefit of said Rosa B. Wright (later Rettenmeyer) in her lifetime and for disposition conformable to the terms of said ante-nuptial contract, her Last Will and Testament and the codicils thereto in event of her death.

XIII. Plaintiffs further say that in breach of trust and violation of law, said defendants, acting jointly and severally and in furtherance of a common design and purpose, did on or about the 31st day of October, 1950, secretly and surreptitiously enter the safety deposit box of said Rosa B. Wright in The First National Bank and Trust Company of Oklahoma City, and without authority of law wrongfully and illegally take, steal and carry away therefrom the U. S. Government Bonds hereinabove set forth and did wrongfully endorse, or cause to be endorsed thereon, an "X" purporting to be an act of said Rosa B. Wright Rettenmeyer, procure the cash value thereof, and convert the same to their own use and benefit to the damage and detriment of said Rosa B. Wright Rettenmeyer, her heirs, devisees and assigns, in the sum of $191,864.64.

XIV. Plaintiffs aver further that said acts were done surreptitiously and secretly; that the knowledge of said transactions was secreted from said Rosa B. Wright Rettenmeyer in her lifetime; that if she had any notice or knowledge thereof, which is by plaintiffs specifically denied, she was so kept, controlled and dominated by the defendants, their agents and servants, and so incapacitated in mind and body and incapable by virtue of guardianship, Powers of Attorney, and secret control of her own attorneys by said defendants that she was powerless to act in her own behalf.

XV. Plaintiffs aver and allege that said Rosa B. Wright Rettenmeyer departed this life on or about the 13th day of December, 1952. Thereafter the defendant, The First National Bank and Trust Company of Oklahoma City, Oklahoma, a corporation, by said law firm of Embry, Crowe, Tolbert, Boxley and Johnson, immediately instituted a proceeding for the appointment of said defendant bank as executor of said estate; that by virtue of the collusion of said defendants hereinabove named, and each of them, in the wrongs hereinabove complained of and their interest therein, said defendant The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such, and

as Executor of the Estate of said Rosa B. Wright Rettenmeyer, and its attorneys, have failed and refused and continue to fail and refuse to institute and prosecute a suit of any kind or character for the recovery of said assets of said estate and increment or profit or any part thereof; that on the contrary, they conspired together to conceal and secrete the true facts respecting the conversion of said property and assets. Plaintiffs, although diligently endeavoring so to do, were unable to discover the facts hereinabove set forth until less than one year prior to the day and date of instituting this proceeding.

XVI. Plaintiffs further allege that the defendant Joseph A. Rettenmeyer has repudiated and breached the terms of the Will and codicils thereto of said Rosa B. Wright (later Rettenmeyer) by virtue of which act and conduct he has forfeited all rights vested in him and those claiming by, through or under him in or to any part or portion of the estate of said deceased, including specifically the moneys and property hereinabove referred to and the claims asserted hereunder.

XVII. Plaintiffs further assert that by virtue of the wrongs herein complained of they as devisees and heirs under the Will and codicils of said Rosa B. Wright (later Rettenmeyer) have suffered and sustained damages in the sum of $191,864.64, together with interest at the rate of 6% per annum thereon from the date of said conversion to this date in the further sum of $39,487.30; that said damages resulted from the fraud, oppression and malice of defendants by virtue of which plaintiffs are entitled to exemplary and punitive damages in the further sum of $231,351.94.

Wherefore, premises considered, plaintiffs bring this suit and pray judgment against said defendants and each of them jointly and severally and in favor of plaintiffs and said estate of Rosa B. Wright (later Rettenmeyer) deceased, as their respective interests appear, for the sum of $231,351.94, together with interest thereon at 6% per an-

num until paid, as actual damages, and for the further sum of $231,351.94 as exemplary and punitive damages, together with all costs of this action.

Young, Young & Young,
By (s) Glenn A. Young,

Attorneys for Plaintiffs George Denham, Clarence Denham, and Mary Jane Hopkins, *nee* Wright;

H. K. Glunt and Young, Young & Young,
By (s) Glenn A. Young,
H. K. Glunt,

Attorneys for Plaintiffs Leona Holcomb, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, and Frank Denham.

Attorneys Lien Claimed Young, Young & Young, and H. K. Glunt.

EXHIBIT 12.

Statement of the United States District Judge and Proceedings on Entry Injunctive Order Complained of.

(Proceedings, November 12, 1954.)

Be it remembered, that on the 12th day of November, A. D., 1954, in the above-designated court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for oral arguments on motions of F. E. Pence, the First National Bank and Trust Company of Oklahoma City, and Frances X. Rettenmeyer, executrix of the estate and Joseph A. Rettenmeyer, deceased, to intervene as parties plaintiff.

• • • • • • • •

The Court: Well, of course, I am under a different im-

pression than that. If I didn't enter an order restraining the prosecution of the action against Aetna, that is what I intended to do.

Mr. Young, Sr.: Well, in that regard I would like to call Your Honor's attention to, that the order does not restrain the prosecution of the suit for conversion against Aetna; it does restrain the prosecution against Aetna of a suit involving this insurance policy, and that clearly does not involve the policy.

The Court: Well, I don't have it before me, but getting back to the thought that I was attempting to express, it seems to me that that might be the more *satisfacory* plan of procedure, to settle all this litigation, let the conversion case be tried in the State Court where all the parties are in court and hold this matter in abeyance, and by virtue of holding it in abeyance the Aetna would still be protected against the possibility of being adjudged liable in the State Court action and having to pay on the annuity contract too. That is something for you to think about in connection with it—with the further proceedings in the case.

You may file your brief in ten days.

Mr. Woolsey: Very well, Your Honor, I will get it in before the ten days elapse.

The Court: And you may have ten days to answer.

Mr. Woolsey: Very well, I would like to clarify this restraining order at this time because I don't want to be faced, when the case is called for trial in the State Court, with the proposition of Mr. Young saying, We are proceeding against the Aetna Life Insurance Company. I think the Denhams in the State Court below should be restrained from proceeding against Aetna Life Insurance Company in any case growing out of the conversion or transfer of these funds.

The Court: That was the order that I intended to make.

Mr. Woolsey: May I prepare an additional or supplemental order to clarify Your Honor's statement?

The Court: You may.

Mr. Woolsey: Very well.

Mr. Young, Sr.: If Your Honor please, we would like to have counsel make formal application for such an order so we could protect ourselves.

The Court: He has made a formal application and I have advised him he may prepare——

Mr. Young: I mean that should be—under the rules an application for restraining order should be made in writing and verified.

The Court: I am construing the order heretofore made.

Mr. Young, Sr.: That order did not call for such an order as that.

The Court: Well, you may prepare a supplemental order which will be intended to construe the order heretofore made, and submit it and I will sign it.

Mr. Woolsey: Very well.

Mr. Young, Sr.: Will that be without notice to us or opportunity to be heard on the matter?

The Court: That is with the notice that you presently—

Mr. Young, Sr.: Well, we will want to give notice of intention to appeal from the order on the ground—we can set them up now—we have had no notice—we had no notice of the entry of the application originally for this restraining order; we have had no notice nor has there been filed a verified application for the present order; there has no evidence been offered to support an order purporting to restrain the prosecution of a suit in a court having jurisdiction, which was prior—previously executed; no bond executed to indemnify against damages in such a case; and upon the further ground that the entry of a restraining order under these circumstances is expressly prohibited by the federal law and the federal rules of civil procedure.

The Court: You may present the order.

Mr. Woolsey: Very well.

Mr. Allen: If it please the Court, there is one matter I would like to call to your attention.

The Court: All right, Mr. Allen, go ahead.

Mr. Allen: It is just this: Your Honor suggests that he is thinking possibly it would be more expeditious to hold this matter in abeyance until the District Court questions are solved. I think Your Honor should bear this in mind: There are now two District Court cases pending. Others may develop. Actually the most expeditious manner in which all this can be settled is right here. If we wait until these two District Court cases and such other cases on this same question that may be filed are disposed of it may go on forever. The controlling question is simply this: Is this a valid policy. And the two issues on that are: Was Rosa B. Wright Rettenmeyer competent——

The Court: I understand the point of view I get from this side of the room is that the only question is do we have a valid policy. From this side the point of view is the only question is whether these bonds were converted—we are not interested in the policy. But it is not quite as simple as you have said.

Mr. Allen: I only meant to suggest that holding this matter in abeyance here might be the least expeditious manner——

The Court: It could be. I just suggest that possibility. I haven't indicated that that is what we will do. I wouldn't be disposed to do it unless there could be some plan or procedure that could be worked out by agreement. I am thinking about the possibility of denying the application for leave to intervene.

Mr. Allen: That is as to the people except Frances X. Rettenmeyer, executrix?

The Court: Yes. And then these parties are confronted with the possibility of having a judgment entered against them for the value of these bonds, and perhaps be foreclosed from recouping from Aetna or from having judgment

over against Aetna. And ordinarily, if there is some way to avoid such an inconsistent outcome of litigation and such an inequitable result, I would be disposed to try to figure out some way to do it.

The Court will be in recess.

Mr. Young, Sr.: May I complete my record on this other matter? I wanted to add, absence of jurisdiction to the other record. Possibly it is sufficiently covered.

The Court: All right.

Filed Nox. 19, 1954. (R. 82-83)

EXHIBIT 13.

Injunctive Order Complained of.

"ORDER CONSTRUING RESTRAINING ORDER HERETOFORE MADE.

Now on this 12th day of November, 1954, it appearing that some confusion has arisen pertaining to the Restraining Orders of the Court heretofore made and entered on the 16th day of April, 1954, and the Order thereafter made on the 17th day of September, 1954, on verbal application of the plaintiff Aetna Life Insurance Company, and in order to construe the Order heretofore made and clarify said order,

It Is Ordered, Adjudged and Decreed, that the defendants, Leona Holcomb, individually, Leona Holcomb as Guardian of the Person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, Ellen Cash, Marion Rettenmeyer, Rufus Denham, Marion Denham, Lewis Denham, Frank X. Rettenmeyer, and Raymond D. Rettenmeyer, be and they are hereby enjoined, and restrained from instituting any suit in any State Court, or are restrained from prosecuting any suit pending in any State Court and further, they are enjoined and restrained from instituting or prosecuting in any United States Court, any

suit or proceeding on account of or pertaining to Policy No. AN 33409 issued by Aetna Life Insurance Company by Rosa B. Wright Rettenmeyer, reserving unto them, however, the right to appear in this suit and assert their claims which they may have if any and that this injunction and restraining order only restrains any judicial proceedings against the Aetna Life Insurance Company by said defendants and enjoins and restrains the prosecution of any suits or causes of action against the plaintiff, Aetna Life Insurance Company including particularly, Cause No. 29092 in the District Court of Creek County, State of Oklahoma, styled Leona Holcomb, *et al., vs.* Aetna Life Insurance Company, *et al.,* and Cause 87402 in the District Court of Tulsa County, State of Oklahoma, entitled, Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.,* to which action of the court in entering the above captioned Order, the defendants, represented by the firm of Young, Young & Young, to-wit: Leona Holcomb, individually, Leona Holcomb, as Guardian of the Person and Estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, object and give notice of their intention to appeal in open court on the grounds and for the reason that they assert they had no notice of the entry of the application originally for the restraining order and no notice, nor has there been filed, a verified application for the present Order of the Court, no evidence offered to support an order purporting to restrain the prosecution of any suit in a court having jurisdiction, no bond executed to indemnify against damages, and upon the further grounds, that the entry of a restraining order is especially prohibited by Federal Laws and *Federals* Rules of Procedure.

Royce H. Savage, Judge.

Filed Nov. 22, 1954." (Tr. 77 and 78.)

EXHIBIT 14.

Statute—Text in full.

28 U. S. C., Sec. 1335. INTERPLEADER.

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another, June 25, 1948, c. 646, 62 Stat. 931."

EXHIBIT 15.

28 U. S. C. F. R. C. P. 65—Text in Full.

"Rule 65. *Injunctions.*

"(a) *Preliminary; Notice.* No preliminary injunction shall be issued without notice to the adverse party.

"(b) *Temporary Restraining Order; Notice; Hearing; Duration.* No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such

shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

"(c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. As amended Dec. 27, 1946, effective March 19, 1948.

"A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

"(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

"(e) *Employer and Employee; Interpleader; Con-*

stitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., Sec. 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C., Sec. 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges. As amended Dec. 29, 1948, effective Oct. 20, 1949."

PROOF OF SERVICE.

I hereby certify that on the ... day of Dec., 1955, I served a copy of the foregoing petition for writ of certiorari upon counsel for the Aetna Life Insurance Company, Farmer, Woolsey, Flippo & Bailey, by depositing the same in the post office at Sapulpa, Oklahoma, with postage thereon fully prepaid, addressed to said counsel at their post office address, to-wit:

Farmer, Woolsey, Flippo & Bailey,
Attorneys at Law,
National Bank of Tulsa Building,
Tulsa, Oklahoma,

.....,
Attorney for Petitioners.

ACKNOWLEDGMENT OF SERVICE.

The undersigned, Farmer, Woolsey, Flippo & Bailey, Attorneys at Law, National Bank of Tulsa Bldg., Tulsa, Oklahoma, Attorneys for Aetna Life Insurance Company, a corporation, hereby acknowledges service of the above and foregoing Writ of Certiorari to have been duly made on us, this the ... day of December, 1955.

.....,
Member of firm, for Respondent.

FILED
FEB 27 1956
HAROLD B. WILLEY, C

No. 598

In the Supreme Court of the United States

October Term, 1955.

Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, *Petitioners,*

vs.

Aetna Life Insurance Company, a corporation, *Respondent.*

Respondent's Brief in Opposition to Petition for Certiorari.

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No. 598

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vs.

Aetna Life Insurance Company, a corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI*.

Introduction.

The action is one in the nature of interpleader, brought by Aetna Life Insurance Company. Aetna had issued an annuity contract to Rosa B. Wright Rettenmeyer. At her death certain of her heirs who were contingent beneficiaries under the annuity instituted conversion actions in the state courts claiming the funds that went to pay the premiums of the annuity. Certain other heirs who were beneficiaries under the annuities asserted claims to benefits under the annuities as contingent beneficiaries. Faced with claims for a refund of the premiums allegedly converted by the insurance company, and with claims asserting the validity of the annuity by two sets of conflicting heirs and beneficiaries plaintiff instituted the present action. The

trial court issued a temporary restraining order enjoining the prosecution of actions against Aetna pending determination of the interpleader action and until the further order of the court. After motion to dismiss was overruled and appeal time elapsed the court entered an order construing the order heretofore made specifically naming certain causes of action pending in the state court against the Aetna. From this order construing the order heretofore made appeal was lodged in the Court of Appeals of the Tenth Circuit, and this court affirmed the trial court (Opinion found Sup. Ct. Tr., p. 3). The present petition for certiorari seeks review of this decision.

Response.

Since the petition for a writ of certiorari filed in this matter fails to make clear the entire factual situation in connection with this litigation we are including in this brief a more detailed statement of the facts than appears in the petition for certiorari.

Outline of Facts.

We believe it would be helpful if we gave a chronological statement of the facts in this case as disclosed by the pleadings and feel in all sincerity that the facts as outlined in appellants' brief fails to give a complete picture of the case. The record discloses:

Rosa B. Wright was the widow of a wealthy Oklahoman named Cal Wright and inherited a considerable estate from him. He died in March of 1928.

Rosa B. Wright married Joseph A. Rettenmeyer in 1937 (Ct. of App., Tr. 13). Prior to her marriage an antenuptial contract was entered into in March of 1937 (Tr. 18).

The gist of this agreement was to the effect that neither Rosa B. Wright nor Joseph A. Rettenmeyer should have any claim on the property of the other. (References hereafter are to the Court of Appeals transcript unless otherwise specified.)

In July of 1946, Rosa B. Wright Rettenmeyer executed a will (Tr. 39). Its terms provided a $10,000.00 bequest to her friend Miss Grace Bartlett, then the remainder and residue of the testatrix's property, real and personal, went share and share alike to the following: Leona Denham Holcomb, a niece; Mary Jane Wright Hopkins, niece and adopted daughter; Frank T. Denham, a nephew; Edward Denham, a nephew; Clarence Denham, a nephew; George N. Denham, a nephew; Raymond Rettenmeyer, Forest Rettenmeyer and F. X. Rettenmeyer, sons of Joseph A. Rettenmeyer and nephews of Rosa by her previous marriage, and Joseph A. Rettenmeyer, her husband, and Donald George Fleming, sons of Leona Denham Holcomb. She nominated the law firm of Embry, Johnson, Crowe, Tolbert, and Shelton of Oklahoma City to be attorneys in the administration of the estate and nominated the First National Bank & Trust Company of Oklahoma City to be executor of the will.

In February of 1949 she suffered a stroke (Tr. 16).

On March 30, 1949, she executed a Power of Attorney to her husband, Joseph A. Rettenmeyer (Tr. 40).

A Second Power of Attorney to her husband was executed April 18, 1949 (Tr. 42).

On November 17, 1950, Rosa B. Wright Rettenmeyer signed an application for the purchase of an annuity contract No. AN33409 from Aetna Life Insurance Company, which is the subject of the interpleader action. It was is-

sued on the 9th of December, 1950. (Tr. 6, *et seq.*) The instrument recites it is a single premium contract and in consideration of payment of the premium of $162,606.00, the Aetna agreed to pay $1,000.00 a month to Rosa B. Wright Rettenmeyer during her lifetime. After the death of Rosa B. Wright Rettenmeyer it provided that each annuity payment of $1,000.00 a month should become payable to Joseph A. Rettenmeyer, husband of the annuitant if then living. That after the death of the survivor, Joseph A. Rettenmeyer, the $1,000.00 a month should be apportioned when due as follows:

$123.07	Ellen Cash, niece of the annuitant
$123.07	Rufus Denham, nephew
$123.07	Marion Denham, nephew
$123.08	Lewis Denham
$123.07	Marion Rettenmeyer (widow of Forest Rettenmeyer)
$123.08	Frank X. Rettenmeyer, nephew of the annuitant
$123.08	Raymond D. Rettenmeyer, nephew of the annuitant
$ 23.08	Frank T. Denham
$ 23.08	Edward Denham
$ 23.08	Clarence M. Denham
$ 23.08	George N. Denham
$ 23.08	Leona Denham Holcomb
$ 23.08	Mary Jane Hopkins

On November 22, 1950, she executed the first codicil to her will (Tr. 43). In this codicil she mentioned the gifts to the heirs mentioned in her will, namely the Denhams, Holcombs, and the Rettenmeyers, and mentioned that Forest Rettenmeyer had died, leaving Marion Rettenmeyer, his wid-

ow, and she wrote that she desired that Marion Rettenmeyer take the part of her estate which would have been taken by the nephew. A certain note of Harve Bateman and Rosa B. Bateman for $10,000.00 was cancelled and the rest of the will was confirmed.

On January 30, 1951, she executed a second codicil (Tr. 45), which confirmed the will as modified by the first codicil and added a remark that if anyone contested the will his or her share becomes a part of the residuary estate and goes to the other heirs.

Rosa received $1,000.00 a month begining in January, 1951, which payments continued on down to her death and then they were paid to Joseph A. Rettenmeyer, which payments continued on down to the date of his death. She died December 13, 1952; he died March 22, 1954. (Tr. 5)

Rosa B. Wright Rettenmeyer was adjudged incompetent by the County Court of Creek County on August 26, 1952, in Cause No. 6366. (Tr. 48) The Petition for Appointment of a Guardian was filed by Joseph A. Rettenmeyer (Tr. 47) through Embry, Johnson, Crowe, Tolbert & Boxley, his attorneys. The County Court appointed her husband, Joseph A. Rettenmeyer, guardian of her person, and appointed Guy L. Berry, a Sapulpa banker, guardian of her estate. At the time of the death of Joseph A. Rettenmeyer $39,000.00 has been returned under the annuity contract, either to Rosa or to Joseph under her power of attorney or to the guardian of Rosa or Joseph after her death.

Letters testamentary were issued in the County Court of Creek County in Case No. 6442 after her will and both of the foregoing codicils had been admitted to probate on January 12, 1953. (Tr. 39)

The First National Bank and Trust Company of Oklahoma City was appointed executor of her estate. The claims and attacks on the annuity contract and a companion annuity policy issued on the life of Donald George Fleming appear first to have been brought out in Case No. 6442 in the County Court of Creek County, which was the Rosa B. Wright Rettenmeyer will case. These attacks appear in the amendments to the Complaint in Intervention (Tr. 69, *et seq.*), and were asserted in a Complaint in Intervention filed by Leona Holcomb and the other above named defendants, Hopkins and Denhams. It was alleged that while Rosa was incompetent and mentally incapacitated, that Joseph A. Rettenmeyer procured from her funds an annuity contract from Aetna Life Insurance Company ostensibly to Donald George Fleming in the face amount of $33,000.00. It was further alleged that within a month after procuring this first annuity contract with her funds, Joseph A. Rettenmeyer secured another annuity contract from Aetna Life Insurance Co. in the face amount of $162,000.00.

In the Complaint in Intervention in the County Court case in the prayer for relief it was sought by the Denham heirs that the executor, First National Bank and Trust Company, be ordered to institute a suit to recover all omitted property belonging to the estate, including monies expended for annuity contracts. This definitely shows that the present group of Denham heirs, Holcomb, Hopkins and Fleming, who are plaintiffs in the State Court cases, are seeking to recover the monies expended for the annuity contracts and unquestionably show that the money went for the purchase of the annuity contracts.

At this point we should call the Court's attention to the fact that the Donald George Fleming annuity is the sub-

ject of another interpleader action, a companion suit to the present case, but not presently before the Court. Thereafter in the same probate case, Leona Holcomb and certain of the other defendants again attacked the validity of the annuity contract and the Donald George Fleming policy in an Amended Complaint in Intervention (Tr. 71). This amendment repeated the facts pertaining to the two contracts with Aetna and the Complaint in Intervention prayed among other things that the executor, First National Bank and Trust Company of Oklahoma City, immediately commence suit to recover the foregoing assets consisting of the monies that went to purchase the two contracts, which total approximately $190,000.00.

This proceeding was heard by the County Court of Creek County on October 22, 1953. Judgment was rendered in that court as appears from the Journal Entry of the Judgment of the County Court. (Tr. 22) Among other things the court found that Rosa B. Wright Rettenmeyer was fully competent to transact her affairs and was in possession of all of her mental faculties and fully competent to enter into contracts with Aetna Life Insurance Company with respect to Policy No. N1669203, October 27, 1950, on the life of Donald George Fleming, and with respect to a Life Insurance Policy or Annuity Contract No. AN33409 dated December 9, 1950. The court made a finding that it would be a useless waste of funds for the estate for the executor to file suit against F. E. Pence and the Aetna Life Insurance Co. and Joe Rettenmeyer to recover the funds of the deceased expended for the policies and that the executor should not add such items to the inventory of the estate and should not institute suit or expend funds of the estate to attempt to recover the same for the estate.

The court further found that the ante-nuptial contract had been destroyed. The court directed that neither the Donald George Fleming policy nor the funds of the decedent expended in the purchase of the Donald George Fleming policy be added to the inventory of her estate and made the same order as to Annuity Contract No. AN33409 or the funds or monies of the decedent expended in the purchase of that annuity contract.

This decision was appealed to the District Court of Creek County.

While the appeal was pending in the County Court case there was filed in the District Court of Creek County Case No. 29092 (Tr. 13). This was filed September 30, 1953. The plaintiffs were Leona Holcomb, Leona Holcomb, as guardian of Donald George Fleming, a minor, Ed Denham, Frank Denham, Clarence Denham, George Denham and Mary Jane Wright Hopkins. The suit was brought against Aetna Life Insurance Company, F. E. Pence (Aetna's agent), Joseph A. Rettenmeyer and the First National Bank and Trust Company, executor of the estate of Rosa B. Wright Rettenmeyer. An analysis of this suit shows that it is a damage suit against Aetna, Pence and Joe Rettenmeyer for wrongfully taking $162,606.00 from Rosa B. Wright Rettenmeyer when she was 80 years old and incompetent. It was a companion suit to a suit filed at the same time, being Suit No. 29114 in the District Court of Creek County. (See Discussion Supplemental, Tr. 22.)

In the Case No. 29114 it was sought by plaintiffs to recover the monies that went to purchase the $33,000.00 Donald George Fleming policy, approximately $25,000.00, and allegations are similar to those in the present suit No. 29092.

Continuing with 29092, an analysis of the petition sets forth the family relationship, the fact that Joe married the wealthy widow, it set out the ante-nuptial contract and then said that Joe set out to circumvent the will and ante-nuptial contract and take for himself and his kin the lion's share of the estate to the exclusion of the plaintiffs. It pleaded the execution of the will and then pleaded that the consent of the First National Bank and Trust Company as executor to recover the bonds and money wrongfully taken could not be obtained, so the bank as executor is joined as defendant. It was alleged that Joseph A. Rettenmeyer got Rosa to execute a power of attorney, and then she had a stroke, that she was totally incompetent, and then sets out that the defendants entered into a scheme to take the $162,606.00 and to accomplish this that Aetna, Pence and Joseph A. Rettenmeyer pursuaded her to liquidate U. S. Government bonds and place the proceeds in her bank account at Oklahoma City and thereafter they took and carried away the money, and as a cloak to legalize the plan and conceal it they placed the Annuity Contract No. AN33409 in and among her effects. The petition alleges that Joseph started getting the $1,000.00 a month, deposited it to Rosa's account and that he himself lived on it until her death in 1952, and that such part as was used for the benefit of Rosa was used without her knowledge or consent and for the purpose of concealing the plan and device from which her estate was taken from her. It prayed judgment for the $162,606.00 with interest against Aetna, Pence and Joseph A. Rettenmeyer.

An amended petition was filed in Case No. 29092 on April 7, 1954, and refiled April 15, 1954 (Tr. 31). Certain parties were added to this case. The plaintiffs were the same and the suit was against Aetna Life Insurance Company, F. E. Pence and Joseph A. Rettenmeyer then Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, the First National Bank and Trust Company of Oklahoma Ciy were added. Then there were certain bankers in Oklahoma City, employees of the First National Bank, namely Virgil F. Sprankle, Grove D. Strother, A. N. Murphy and Justin W. Faherty, added as defendants.

In the petition it is alleged that after identifying the defendants, that Joseph A. Rettenmeyer at all times was the agent, attorney in fact or guardian of Rosa B. Wright Rettenmeyer and in committing the tort complained of and in converting the property he acted for himself and as agent for his own children.

The petition sets out the identity of Aetna Life Insurance Co. and Pence and then mentions the size of Rosa's property, the intended marriage, the ante-nuptial contract, the will and the codicils, and then alleges that after executing the will and codicils she became incompetent. The petition alleges that the ante-nuptial contract, the wills and codicils were prepared by John Embry, her attorney, or his law firm, and that these attorneys were also attorneys for Pence, Aetna and Joseph A. Rettenmeyer.

The petition then sets forth that she owned certain United States Government bonds with a market value of $191,-864.64. The petition then alleges that the bonds would have been divided according to her will, that is, 1/11th to Joseph A. Rettenmeyer and 7/11ths to the plaintiffs, and that it was the duty of the defendants to preserve her property for

disposition conformable to the terms of her ante-nuptial contract, will and codicils, but then alleges that there was a breach of trust in that the defendants on October 31, 1950, secretly entered her lockbox in the First National Bank & Trust Company and without authority of law, took, stole and carried away the bonds and endorsed an "X" or caused an "X" to be endorsed, purporting to be the act of Rosa B. Wright Rettenmeyer and procured the cash value of $191,-864.64 and converted it to their own use. It will be observed that at this time the plaintiffs have added 29114, being the suit on the Donald George Fleming policy, Case No. 29092, and have now made Case No. 29092 a suit for conversion for the full amount of the bonds that went to purchase the two insurance contracts, and omitted any reference to annuities.

Plaintiffs asserted a claim under the appeal in the County Court case for a return of the monies that went to set up the two insurance contracts and in this present amendment to the complaint without mentioning the two contracts, they now seek to turn the case into a conversion suit for conversion of $191,864.64. It was alleged that Rosa B. Wright Rettenmeyer had no knowledge of the foregoing or that she was so dominated by the defendants that she was powerless to act in her behalf.

The petition then alleges that she died December 13, 1952, that the bank was appointed executor, and that it refused to sue for the recovery of the assets of the estate and increment or profit or any part thereof. And further that the plaintiffs were unable to discover the facts until less than one year prior to the date of filing the action. That the plaintiffs (although they had no present property right in the bonds) suffered damage in the sum of $191,864.64

with interest at $39,487.00, or a total of $231,351.94 plus punitive damages in the sum of $231,351.94.

Thereafter on April 15, 1954, in the District Court of Tulsa County in Case No. 87402 the same lawsuit was filed (Tr. 72).

On April 16, 1954, the present action resulting in this appeal was filed in the United States District Court for the Northern District of Oklahoma, being Case No. 3502 (Tr. 3). This was Complaint for Interpleader and was brought by Aetna Life Insurance Company against all the beneficiaries in the Policy No. AN33409.

The complaint shows that the plaintiff is a Connecticut corporation and that the defendants, Leona Holcomb, individually, Leona Holcomb as guardian of Donald George Fleming, a minor, and Donald George Fleming, a minor, Edward Denham, Frank T. Denham, George N. Denham, Leona Denham Holcomb, and Mary Jane Wright Hopkins are all citizens and residents of the State of Oklahoma. The defendant Raymond D. Rettenmeyer is a resident of the State of New York, Frank X. Rettenmeyer is a citizen of the State of New Jersey, Marion Rettenmeyer is a citizen of the State of Oregon, the defendant Lewis Denham is a resident of the State of Idaho, the defendant Marion Denham is a resident of the State of Washington, the defendant Rufus Denham is a resident of the State of Washington, and Ellen Cash is a resident of the State of Idaho. The complaint alleges diversity of citizenship, and that the amount in controversy exceeds the sum of $3,000.00.

The ante-nuptial contract is pleaded, the will is referred to, and various other facts are set forth in the complaint. The complaint alleges, after setting forth the admission of the will to probate with the codicils, that the Oklahoma Den-

hams, Mrs. Hopkins, Donald George Fleming and Leona Holcomb, filed Case No. 29092 against Aetna, attacking the validity of the annuity contract and seeking to recover the premium paid of $162,606.00 for the estate of Rosa B. Wright Rettenmeyer. The complaint then sets out the order of the County Court of October 22, 1953, holding that Rosa was competent and instructing that no suit against Aetna be filed. It alleges then that Joseph A. Rettenmeyer died on the 22nd of March, 1954. It alleges that the beneficiaries named in the annuity contract who were not parties to Case No. 29092, namely the Rettenmeyers, Lewis Denham, Marion Denham, Rufus Denham and Ellen Cash are claiming to be entitled to monthly payments provided in the annuity contract.

Thereafter the amended petition filed in Case No. 29092 is referred to. It is then alleged that the Denhams, Leona Holcomb and Mary Jane Hopkins by reason of their petition are seeking to have the single premium payment of $162,-606.00 paid back by Aetna to the estate of Rosa B. Wright Rettenmeyer and that by reason of these conflicting claims the plaintiff alleges that a conflict has arisen as to which of the defendants are entitled to payments of their respective claims and the plaintiff has been and may be subjected to vexatious and multitudinous lawsuits and further subjected to multiple payments in the event all of the defendants should prevail.

Then plaintiff sets forth that it has filed a bond with good and sufficient surety, the record shows the bond was approved by the court; then it prays that each defendant be restrained from instituting any action against the plaintiff or from prosecuting any pending action or actions against the plaintiff for recovery of the policy's proceeds, or any

part thereof, until the further order of the court and that the defendants be required to interplead and settle between themselves their rights.

At the same time on April 16, 1954, there was issued (Tr. 49) an Order for Issuance of Process and an Injunction against Interpleaded Claimants, and after reciting the facts, including the fact that the Denhams, Hopkins, and Holcomb are claiming a return of the premium and that the defendants, Cash, Rettenmeyer and the remaining Denhams claim to be entitled to payments of the contract, and it further appearing that the plaintiff Aetna has deposited its bond, it was ordered that the clerk issue process for the defendants, and it was further ordered,

> "that the defendants, Leona Holcomb, individually, Leona Holcomb as guardian of the person and estate of Donald George Fleming, and all the remaining defendants, be, and they are hereby enjoined and restrained from instituting any suit in any state court or are restrained from prosecuting further any suit pending in any state court, and further they are enjoined and restrained from instituting or prosecuting in any United States Court any suit or proceeding on account of or pertaining to policy No. AN33409 issued by Aetna Life Insurance Company to Rosa B. Wright Rettenmeyer, reserving unto them however the right to appear in this suit and assert their claim which they may have, if any."

The record shows that personal service was had in the districts where each defendant lived and there is no question raised as to the validity of service of process or service of the temporary injunction. The defendants, Marion Rettenmeyer, Rufus Denham, Marion Denham, Lewis Den-

ham, Frank X. Rettenmeyer and Raymond D. Rettenmeyer filed an answer (Tr. 56) in which they claimed the benefits under the annuity contract.

The defendants, Leona Holcomb, Hopkins, Fleming and the Oklahoma Denhams filed a Motion to Strike Certain Portions of the Complaint (Tr. 57), a Motion to Dismiss Complaint for Interpleader, Vacate Order for Issuance of Process and Injunction against Interpleaded Claimants and Response to Application of Plaintiff (Tr. 59). In this motion it is stated by the movants that they are not adverse claimants to the remaining defendants under the provisions of the Interpleader Act, for that their claim is for willful tort against the plaintiff in converting the United States bonds and entitle the movants and the estate of Rosa B. Wright Rettenmeyer to statutory damages, whereas the claims of the remaining defendants in this action are for payment provided for them by the contract.

It is further stated in the motion, regarding Aetna's liability, that "Its obligation to make contractual monthly payments is plaintiff's alone, and in no wise related or connected to the tort complained of." Other grounds are raised in the motion, which speaks for itself. The defendant Ellen Cash, represented by the Youngs, filed a Motion to Strike, a Motion to Vacate the Injunction, and then an Answer (Tr. 63). The Motion to Vacate the Injunction states that she is entitled to sue on the contract of insurance in Idaho and in her answer she states that she is entitled to the monthly payments and that the plaintiff is obligated to pay $123.07 a month for which she seeks judgment.

On June 23, 1954, the plaintiff filed an Amendment to its Complaint for Interpleader (Tr. 69) in which the plaintiff alleged that the Annuity Contract was purchased by Rosa B.

Wright Rettenmeyer with the proceeds of the U. S. Government bonds mentioned in the amended petition filed by Leona Holcomb in Case No. 29092 and that Rosa B. Wright Rettenmeyer signed the application for insurance and was competent when she signed the application and that she specified the terms and provisions of the annuity contract and thereafter ratified the contract by accepting the annuity payments during her lifetime and prior to the date that she was adjudged incompetent on August 26, 1952 (Tr. 42). That after she was adjudged incompetent, payments were made to the guardian of her estate, and on her death payments were made to Joseph A. Rettenmeyer, the sum total of which amounts to $39,000.00.

Then the complaint further alleges that the Denhams, Holcomb, Hopkins and Fleming parties have attacked the validity of the annuity contract, not only in the manner alleged in the Complaint in Interpleader, but also in Case No. 6442 in the County Court of Creek County in which is pleaded the contention that the purchase of the Donald George Fleming Annuity and the purchase of the large annuity were procured while she was incapacitated and that it was sought in the County Court proceedings to require the executor to institute suits to recover the money that went to purchase the two annuity contracts.

It is then shown in the amendment to the complaint (Tr. 71) that an amended complaint in the County Court was filed wherein the same attack was made on the validity of the annuity contract and the validity of the Donald George Fleming annuity. It was then alleged that Leona Holcomb and the Denhams and others in the same situation again attacked the validity of the annuity contract in Case No. 87402 in the District Court of Tulsa County, styled

Mary Jane Hopkins, et al., *vs.* Aetna Life Insurance Co. To this amended complaint the Holcomb, Denham, Hopkins and Fleming interests filed amendments to their various motions and a supplemental motion to dismiss (Tr. 72).

The record shows that on the 17th day of September, 1954, the court entered an order overruling the motion to strike and overruling the motion to dismiss the complaint. This order after reciting appearances (Tr. 76) is as follows:

> "* * * and the court having heard argument of counsel and being fully advised finds that the motion to dismiss the complaint for interpleader should be overruled, that the motion to strike and amended motion to strike should be overruled, the motion to vacate the order for issuance of process and the motion to vacate the injunction should be overruled as to the order for issuance of process and overruled in part and sustained in part as to the motion to vacate the injunction in that the motion should be overruled as far as it affects Aetna Life Insurance Company and sustained in so far as it affects the remaining defendants. The special appearance and motion to suppress the depositions and subpoenas for the depositions should be overruled.
>
> "It Is Therefore Ordered, Adjudged and Decreed that the various motions be overruled, and sustained as hereinbefore set forth and the temporary restraining order heretofore issued on April 16, 1954, is hereby vacated in so far as the same enjoins or restrains any judicial proceedings or actions of any kind or character against any person, firm or corporation except the plaintiff, Aetna Life Insurance Company, and in so far as said injunctions and restraining order restrains and enjoins the prosecution of any suits or causes of action against the plaintiff, Aetna Life Insurance Company, said injunction and restraining order is continued in full force and *effect pending the determination of this*

action and the further order of the court. Royce H. Savage, Judge." (Italics ours.)

The court therefore overruled the motion of the defendants to dissolve the injunction in so far as it affected Aetna Life Insurance Co. This order was filed October 4, 1954, and at that point certainly was an appealable order. An appeal was not taken within time from the order of the court on that proceeding.

We then come to the order from which the appeal was taken to the Court of Appeals, which was entered on November 12, 1954:

"Now, on this 12th day of November, 1954, it appearing that some confusion has arisen pertaining to the restraining orders of the court heretofore made and entered on the 16th day of April, 1954, and the order thereafter on the 17th day of September, 1954, on verbal application of the plaintiff Aetna Life Insurance Company, and in order to construe the order heretofore made and clarify said order,

"It Is Ordered, Adjudged and Decreed, that the defendants, Leona Holcomb, individually, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, Ellen Cash, Marion Rettenmeyer, Rufus Denham, Marion Denham, Lewis Denham, Frank X. Rettenmeyer and Raymond D. Rettenmeyer, be and they are hereby enjoined, and restrained from instituting any suit in any State Court, or are restrained from prosecuting any suit pending in any State Court and further, they are enjoined and restrained from instituting or prosecuting in any United States Court, any suit or proceeding on account of or pertaining to Policy No. AN33409 issued by Aetna Life Insurance Company to Rosa B. Wright Rettenmeyer,

reserving unto them, however, the right to appear in this suit and assert their claims which they may have if any and that this injunction and restraining order only restrains any judicial proceedings against the Aetna Life Insurance Company by said defendants and enjoins and restrains the prosecution of any suits or causes of action against the plaintiff, Aetna Life Insurance Company, including particularly Cause No. 29092 in the District Court of Creek County, State of Oklahoma, styled Leona Holcomb, et al., *vs.* Aetna Life Insurance Company, et al., and Cause No. 87402 in the District Court of Tulsa County, State of Oklahoma, entitled Mary Jane Hopkins, et al., *vs.* Aetna Life Insurance Company, et al., * * *"

This order came about as a result of certain remarks counsel for the appellants made in an argument on motions filed by the First National Bank and Trust Company for leave to intervene as well as Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin Faherty, employees of the bank. See Supplemental Tr., pages 1-4. F. E. Pence had also filed a motion for leave to intervene (page 5) and F. X. Rettenmeyer as executor of the estate of Joseph A. Rettenmeyer had filed a motion for leave to intervene. The status of the case at that point was the court was hearing arguments on the motions for intervention and at a certain point in the argument, which took place on November 12, 1954, after the appeal time on the order overruling motion to dismiss and the order continuing the injunction in force as to Aetna Life Insurance Company, one of the counsel for the appellants made the following remark which precipitated this present appeal. He said (S. Tr. 26):

"* * * We have examined, since this last hearing, with a little bit more care the exact order Your Honor issued. We were under the impression previously that

> Your Honor's order attempted to enjoin prosecution of that case in the state court. We have found the order does not so indicate, and we think, properly so."

At that point counsel for Aetna said as follows:

> "I take it from counsel's statement a moment ago in his argument that he takes the position that the plaintiffs, the Denhams, are not now restrained from proceeding against Aetna in the District Court case—I gathered that from his remarks."

These statements by Mr. Young and Mr. Woolsey precipitated the colloquy between the court, Mr. Young and Mr. Woolsey (Tr. 80), and the court said:

> "That was the order that I intended to make.",

and the court further said:

> "I am construing the order heretofore made."

It is from that order that the appeal was lodged in the Court of Appeals.

The Court of Appeals for the Tenth Circuit affirmed the decision of the trial judge. See Opinion (Sup. Ct. Tr., p. 3, *et seq.*, or Petition for Certiorari, p. 21, *et seq.*).

The Opinion as written clearly states the views and reasons of the Court of Appeals and need not be here reemphasized.

The Petition for Certiorari seeks to invoke the jurisdiction of this Court for several reasons: *First*, because of an alleged unwarranted interference by a federal district judge with lawful jurisdiction of the state court; *second*, because the Court of Appeals of the Tenth Circuit has so far sanctioned a departure from the accepted and usual course of proceedings by a lower court as to warrant exercise of the Supreme Court's power of supervision; *third*, it has decided a federal question in conflict with the applicable

statutes of the United States, and controlling Rules of Federal Procedure; *fourth,* it has decided an important question of federal law contrary to the conclusions of other courts but which has not been and should be settled by this Court.

I.

The Court of Appeals Properly Construed 28 U. S. C. A. 1335, 1397, and 2361.

Congress in 1948 provided for injunctions in actions in interpleader and in the nature of interpleader.

28 U. S. C. A., Sec. 2361, is as follows:

"In any civil action of interpleader or in the nature of interpleader under Section 1335 of this title, a District Court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any state or United States Court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such District Court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970; amended May 24, 1949, c. 139, Sec. 117, 63 Stat. 105."

The rights of the plaintiff to bring the action of interpleader are determinable in the light of Title 28, U. S. C. A., Sec. 1335, which is quoted in its entirety:

"(a) The District Courts shall have original ju-

risdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

"(1) Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931."

The venue of this action lies in the Northern District of Oklahoma. See U. S. C. A., Title 28, Sec. 1397:

"Any civil action of interpleader or in the nature of interpleader under Section 1335 of this title may be

brought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 464, Stat. 936."

The action that we have brought is an action in the nature of interpleader and it may be brought even though the plaintiff has an interest in the subject matter and is not a disinterested party. See the discussion in Vol. 6, Cyclopedia of Fed. Proc., Sec. 2203, as follows:

"* * * Although a pure bill of interpleader lies only on behalf of one who stands indifferent between conflicting claimants, claiming no interest in the subject-matter, disinterestedness is not necessary to a bill in the nature of interpleader, and if there are other equities to support the suit it may be entertained as one in the nature of interpleader and relief administered therein."

A case in point and quite like our case at bar is the case of *Equitable Life Assurance Society of the United States* v. *Maloney*, 85 F. Supp. 212 (U. S. Dist. Ct., Eastern Dist. of Mo.). This case is interesting as it is one of the first cases decided following the Interpleader Act of 1948. Syllabus 2 is as follows:

"Where complainant has an interest in outcome of proceeding and there are conflicting claims for fund held by complainant and complainant has some right to equitable relief with respect to the fund, the complainant may proceed by a bill in the nature of interpleader."

Syllabus 3:

"Where annuitant's administrator brought action against insurer and beneficiary charging that all annuity contracts were purchased by annuitant when she was advanced in age and of sick and feeble mind, defendant beneficiary practiced fraud and undue influence to obtain property of annuitant through instrumental-

ities of annuities action only assailed annuity contract in which such defendant was beneficiary but nature of charges were such that insurer might be confronted with conflicting claims as to other annuity contracts, the insurer had right to equitable relief as between non-resident claimants and resident administrator and could maintain a bill in nature of interpleader. 28 USCA, Sec. 1335."

An examination of the opinion discloses that the facts are almost on all-fours with the present facts. The annuitant in the *Equitable* case was an elderly lady past 80; she had purchased 25 annuity contracts from the plaintiff insurance company. Her administrator filed a suit in the State Court seeking to secure all the money paid the insurance company for the issuance of the annuity contracts on the theory she was aged and incompetent. Certain of her heirs and beneficiaries under her annuity contracts were about to claim the benefits under the policy and the insurance company filed an interpleader action. The court in its opinion answers nearly all the contentions of the present appellants. See page 215:

> "* * * but was an action to secure all the money paid the Assurance Society for the issuance of the annuity contract. It follows plaintiff Assurance Society had an interest in the State Court proceeding other than that of a mere stakeholder. * * *
>
> "If the complainant has an interest in the outcome of the proceeding and there shall be conflicting claims for the fund held by the complainant, and the complainant shall have some right to equitable relief with respect to the fund, complainant then may proceed by 'a bill in the nature of interpleader.' Prior to the 1948 revision, under such conditions, it was held, where plaintiff sought to present his case by 'strict bill of interpleader'

that it was 'clearly sufficient as a bill in the nature of interpleader,' if jurisdictional facts are established. *Hunter* v. *Federal Life Ins. Co.*, (8th Cir.) 111 F. 2d 551, loc. cit. 556. See also, *Klaber* v. *Maryland Casualty Co.*, (8th Cir.) 69 F. 2d 934, loc. cit. 940, 106 A. L. R. 617. We think the 1948 revision has further liberalized interpleader action. The amendment inserted, with respect to adverse claimants, not only those who 'are claiming' but added those who 'may claim' to be entitled to share in the fund."

The *Equitable Life Assurance* case cites several cases which are long established and are authorities in support of our position that interpleader is the proper action even though plaintiff has some interest in the matter and is denying certain of the claims and contesting them. See *Standard Surety & Casualty Company of New York* v. *Baker, et al.*, (8th Cir., 1939) 105 F. 2d 578, syllabus 1:

"'Interpleader' is an equitable remedy available in federal courts."

(Syllabus 3:) "The fact that plaintiff has some personal interest in subject matter does not preclude plaintiff from maintaining a bill in the nature of interpleader. Jud. Code, Sec. 24(26), as amended Jan. 20, 1936, 28 U. S. C. A. Sec. 41(26); Rules of Civil Procedure for District Courts, Rule 22, 28 U. S. C. A. following Section 723c."

Hunter v. *Federal Life Insurance Co.*, (8th Cir., 1940) 111 F. 2d 551, syllabus 4:

"The jurisdiction of a federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants."

(Syllabus 5:) "A stakeholder, acting in good faith, may maintain a suit in interpleader for purpose of rid-

ding himself of vexation and expense of resisting adverse claims, though he believes that only one of them is meritorious."

In an action for interpleader temporary injunction or restraining order may be granted. In this case we endeavored to follow the process and procedure set up in Title 28, U. S. C. A., Sec. 2361. (See *supra*, p. 21.)

The right of the plaintiff to have an action for interpleader based on Section 1335 should be considered in view of Rule 22 of the Rules of Civil Procedure. Rule 22 (Title 28, U. S. C. A., page 77) provides:

"(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C. A., Secs. 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, effective October 20, 1949."

The preliminary injunction granted was in effect a temporary restraining order. It was granted on the verified

complaint of the plaintiff. The amendment to the complaint related back to the original complaint (FRCP, Rule 15 (c)). So therefore the contention that the pleading was unverified is without foundation.

A study of the record shows that the contention that the trial court issued its order without reciting its reasons or without a showing of irreparable injury is without merit. The complaint shows that irreparable injury that plaintiff would sustain if it was not granted the relief sought and the Order for issuance of process and Injunction issued recited clearly the findings of facts and reasons for its issuance. (See Tr., p. 49, and Order overruling motion to dismiss complaint and vacate the injunction. Tr., pp. 76, 77.)

II.

The Court of Appeals Did Not Disregard Provisions of 28 U. S. C. A. 2283, and F. R. C. P. 22 and 65.

One of the points that counsel make in their petition for certiorari is that the restraining order was issued without notice. Although Rule 65 of the Rules of Civil Procedure provide that no preliminary injunction shall be issued without notice to the adverse party, there is no provision in the chapter on Interpleader, Title 28, Sec. 2361, providing for notice. In fact, if notice were required in interpleader actions, particularly where one of the defendants or claimants lives across the United States from the plaintiff, if he were served with a notice that a restraining notice was about to be requested, by the time the restraining order was heard, the very suit that injunction seeks to prevent would be filed in some far court and the purpose of the Interpleader Statute would be defeated. The Rules provide further that they do not affect or modify the Statutes of the United States,

pertaining to preliminary injunctions in actions of interpleader or in the nature of interpleader. See Rule 65e as follows:

> "These rules do not modify any Statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C. A., 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; * * *"

It is said in Cyclopedia of Federal Procedure, Third Edition, Vol. 6, Sec. 22.54:

> "Similarly, the present Act (Interpleader) provides that the District Court may enter its order restraining claimants from instituting or prosecuting any proceeding in any state or federal court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. * * * In order to avoid the possibility of interference with the full working of the Interpleader Act, Rule 65(e) provides that the Rules of Civil Procedure do not modify the provisions of 28 USC 2361, relating to preliminary injunctions in actions of interpleader."

III.

An Injunction Bond as Required by Rule 65 Was Unnecessary; The Bond Filed Was Sufficient.

The language of the interpleader act itself, Title 28, Sec. 1335, gives jurisdiction in interpleader actions if the first requirements are met, and if—

> "2—the plaintiff has deposited such money or property or has paid the amount of, or the loan, or other value of such instruments, or the amount due under such obligation into the registry of the court there to abide the

judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy."

The record at page 50 shows "an approved bond in the sum of $25,000.00 was filed April 16, 1954."

This question of the amount of the bond was raised by appellants in their motion to dismiss. (Tr. 59) This motion was overruled by the trial court and no timely appeal taken therefrom.

IV.

The Interpleader Statutes and Rules Do Authorize Federal Courts to Enjoin Prosecution of Tort or Other Actions for Damages Pending in State Courts.

The language authorizing such action is found in the statute. 28 U. S. C. A., Sec. 2361, says:

> "In any civil action of interpleader or in the nature of interpleader * * * a District Court may issue its process for all claimants and enter its order restraining them from instituting *any* proceeding in any state or United States Court affecting the property, instrument or obligation involved in the interpleader action until further order of the court."

It cannot be successfully argued that a tort action in which recovery is sought of funds or bonds that went to purchase an annuity contract does not affect the obligation of the annuity. If the claimants are successful in their conversion action and recover the funds that created the annuity, they cannot have the benefits of the annuity. Such

an action and the remedy of restraint of the existing actions of whatever kind are within the purview of the Interpleader Statute.

V.

The Present Case Is Not Such a Case as Under the Rules in Its Present Status Justifies *Certiorari.*

Rule 19 of this Court is as follows:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character or reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial questions in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A study of the brief fails to reveal any citations to show that the present case is brought within the scope of the above rule.

Conclusion.

The case presented by petitioners does not reveal a situation of special circumstances that justify the granting of the writ in view of the rules of this Court and the long-standing rulings that certiorari is granted only in special circumstances and only in cases of peculiar gravity and general importance. For these and the foregoing reasons it is respectfully urged that the judgment of the United States Court of Appeals for the Tenth Circuit is eminently correct and the application for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No. 598.

Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, *Petitioners,*

vs.

Aetna Life Insurance Company, a corporation, *Respondent.*

REPLY BRIEF OF PETITIONERS FOR *CERTIORARI.*

The respondent, Aetna, devotes over 17 pages of its brief in opposition to certiorari to a recitation of alleged facts in a case in which no witness has ever been sworn or other evidence of any character offered.

Thereafter, on page 18 of its response, Aetna proceeds:

> "We then come to the order from which the appeal was taken to the Court of Appeals, which was entered on November 12, 1954."

Then follows a partial but materially incomplete portion of injunctive order. Respondent next devotes approximately two further pages of its brief to statements of matters wholly extraneous to the issues properly before this Court. In this manner Aetna seeks to obscure and evade the grounds upon which petitioners have been obliged to invoke the jurisdiction of this, The Supreme Court of the United States.

That portion of the injunctive order which Aetna does set forth in its brief discloses that:

1. The injunction complained of was issued,

"* * * on verbal application of the plaintiff, Aetna Life Insurance Company * * *."

2. That the injunction was permanent in form.

"It Is Ordered, Adjudged and Decreed that the defendants * * * be and they are hereby enjoined, and restrained * * *."

3. That the order specifically enjoined prosecution of cause 87402, in the District Court of Tulsa County.

"* * * this restraining order * * * enjoins and restrains the prosecution of * * * Cause 87402 in the District Court of Tulsa County, State of Oklahoma, entitled Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.*, * * *."

Error of the court "in restraining and enjoining defendants from proceeding in Cause No. 87402, in the District Court of Tulsa County, State of Oklahoma, entitled Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.*, is the specific basis of complaint set forth in the statement of points relied upon on appeal. (Tr., p. 1)

For convenience of the Court the Petition in Cause No. 87402, in the District Court of Tulsa County, Oklahoma, being Exhibit 5 to the Amendment to Complaint for Interpleader, is set forth in *haec verba* in the Appendix to Petion for Certiorari as Exhibit 11, pages 38 to 44-b. *Examination of this exhibit will disclose clearly that the cause of action therein set forth is neither directly or indirectly one for benefits under an annuity issued by Aetna Life Insur-*

ance Company, whether under policy AN 34409 or otherwise.

Cause No. 87402 is a suit for damages, actual and punitive, under the laws of the State of Oklahoma, in the total sum of $462,703.88. Petitioners, in substance, complains in that suit that on or about the 31st day of October, 1950, diverse persons, including an agent of Aetna, acting jointly, secretly entered the private safety deposit box of petitioners' testatrix; that they unlawfully took therefrom certain specific registered U. S. Bonds and by affixing an "X" thereon and fraudulently representing the same to be the signature of the registered owner (petitioners' testatrix), who was at the time to their knowledge wholly incapacitated and slowly dying, converted the proceeds of such bonds to defendants' own purposes.

Aetna's coldly calculated effort to divert attention from Case No. 87402 by what it categories "a chronological statement of the facts in this case" is followed by the demonstrably false statement on page 12, that:

> "Thereafter on April 15, 1954, in the District Court of Tulsa County in Case No. 87402 the same law suit was filed." (Tr. 72)

Aetna's object in discussing the alleged facts and proceedings in other cases with only the indirect and incorrect reference to cause No. 87402, quoted, indicates that to sustain an indefensible position, respondent not only supplies testimony in an action in which no evidence was offered or received, but shies completely away from an exhibit to its own amended but unverified complaint which shows clearly that Cause No. 87402 in no manner involved claims under any annuity insurance policy issued by Aetna which could properly give rise to an action in interpleader. The cause

of action set forth in the state court suit arose before the annuity on which Aetna premises the so-called interpleader suit was applied for.

Aetna's brief omits that portion of the injunction complained of which shows the date the injunction was actually entered November 22, 1954, rather than November 12.

Aetna's brief also omits that portion of the injunction which shows that at the time the U. S. District Judge from the bench, in the course of hearing unrelated matters, announced an intention to enter such an injunction, his attention was specifically invited to the fact that:

(*a*) No verified application for the injunction had been filed;

(*b*) No evidence had been offered;

(*c*) No notice had been given;

(*d*) No bond had been executed;

(*e*) The entry of such an injunction was expressly prohibited by federal law and the Rules of Civil Procedure.

POINT I.

Aetna endeavors to answer Point I wherein petitioners assert that the U. S. District Court erred in construing 28 U. S. C. A. 1335, 1397, and 2361, to authorize issuance of a permanent injunction on oral application, based on an unverified pleading and without notice or evidence, by a contention that:

> "The action that we have brought is an action in the nature of interpleader * * *." (Br. 23)

And cite authorities—

> "* * * in support of our position that interpleader is the proper action * * *." (Br. 25)

And to the rule that—

> "In an action for interpleader temporary injunction or restraining order may be granted." (Br. 26)

All of which is, of course, completely alien to any issue here. Aetna concludes this point by asserting that:

> "The preliminary injunction granted was in effect a temporary restraining order." (Br. 26)

Aetna ignores the record herein showing petitioners have been since the date of the injunction (Nov. 22, 1954) prevented from proceeding with the trial of a suit at law for tort in a state court of competent jurisdiction, and that, unless afforded relief in this Court they will continue indefinitely, if not permanently, enjoined from pursuing *the only remedy available to them in any court, state or federal.*

In the interim, *without either paying or offering to pay its obligations in either the state court suit or the federal court,* Aetna enjoys the unique advantage of standing by while witnesses disappear, evidence is lost or vanishes and defendants die. Aetna thus effectively aborts the judicial power and authority of the courts of the State of Oklahoma to proceed with the trial of a suit in which exclusive jurisdiction of the state court cannot be reasonably doubted.

Aetna at page 27 misquotes F. R. C. P., Rule 15 (c), in an effort to justify its failure to verify the Amendment to its Complaint. The rule reads:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Aetna omits "to the date of" and asserts that rule to declare that "the amendment to the complaint relates back to the original complaint." (Br. 27) Which is exactly no answer to the proposition that the amendment, wherein alone Cause No. 87402 is so much as mentioned, is unverified. There is certainly nothing in Rule 15 (c) to indicate that a *verification* relates *forward* to cover new and different allegations in a subsequent pleading.

Aetna ignores the fact that the injunction itself cites that it was issued "on verbal application" and *not on the basis of either the original complaint or the amendment thereto.*

Aetna further declares under this head:

> "The complaint shows that irreparable injury that plaintiff would sustain if it was not granted * * *." (Br. 27)

Obviously this statement is merely gurgling. It's hard to conceive how Aetna under the most favorable statement of the case could suffer irreparable damage by the trial in the state court. For if Aetna is innocent of the wrong complained of in the State Court, it could not be irreparably damaged by the opportunity afforded to establish its innocence.

On the contrary, if Aetna did in truth and fact surreptitiously loot the private bank safety deposit box of plaintiffs' testatrix, as alleged, one would ordinarily suppose a *federal court of equity* one of the last places where it would find refuge from the consequences of its wrong.

POINT II.

Aetna's argument under Point II indicates clearly that its contention in the U. S. District Court (which was sustained in the Tenth Circuit) is that *in actions in the nature of interpleader injunctions may be issued without notice to the adverse party.* This conflict in the decisions between the Tenth and other circuits is one of the grounds relied upon herein for certiorari.

POINT III.

Under this head Aetna argues in effect that no bond was required to support the injunction entered Nov. 22, 1954, which is the only injunction ever entered enjoining the prosecution of Cause No. 87402 in the state court. Herein again Aetna in effect points up the wide variance between the decisions of the Tenth Circuit and those of other circuits and of the federal law itself. See Title 28, U. S. C., Sec. 1335.

On what theory damages for wrongfully procuring a subsequent injunction could be imposed on a surety under an indemnity bond and made to "relate back" for some months is not made apparent. No authorities to sustain such a proposition are cited. That such a departure in the usual rules has been sanctioned in the Tenth Circuit further emphasizes the claim to certiorari.

POINT IV.

Under this head Aetna merely interposes an argument based upon alleged facts in an action where no evidence was offered and the injunction was entered on "verbal applicatio." No authorities are cited. The record thus indicates

Aetna's claim, first sustained in the opinion herein in the Tenth Circuit, that if in the federal court the action is merely declared to be one in interpleader, the federal court may summarily enjoin any suit of any kind in any court. That such is in substance the holding herein in the Tenth Circuit demonstrates that certiorari is warranted.

POINT V.

Under Point V Aetna argues that under Rule 19 of this Court certiorari is not warranted. Yet without certiorari petitioners find themselves confronted with a situation wherein they have been, and presumably will continue to be, summarily cut off *from any remedy in either state or federal court* for the wrongs complained of in their petition filed in the State Court in Tulsa County, Oklahoma. The cause of action set forth in their petition in the state court is not one over which the federal court can, in any manner, acquire jurisdiction in an action in the nature of interpleader or otherwise. The case is one that is non-removable. It is a suit within the exclusive jurisdicton of the state court, and *is an entirely different cause of action from any which could arise under Aetna's annuity.*

That a United States District Court should attempt to make a federal court of equity an asylum for wrong-doers who seek refuge from valid claims against them in suits at law in a state court of competent jurisdiction, such as that at bar, where it is clear that under no theory could the federal court acquire jurisdiction to determine the issues tendered in the state court proceeding, and that by this method persons asserting in good faith in the state court a cause of action such as that set forth in the petition in Case No. 87402 may be deprived of a remedy—even the

right to be heard on any issue of either fact or law in the United States District Court is a further circumstance making certiorari in the instant case an urgent and compelling method of obtaining relief, for petitioners have exhausted every other.

Wherefore petitioners renew their prayer that the writ be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. 598

Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, *Petitioners,*

vs.

Aetna Life Insurance Company, a corporation, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING *CERTIORARI.*

Petitioners feel confident that the Supreme Court of the United States of America does not intend by denial of certiorari herein to approve any practice or procedure whereby inferior federal courts of equity are permitted to become a haven and refuge for tort feasors who, in the state courts, stand lawfully charged with the surreptitious and fraudulent conversion and misappropriation of property.

They, therefore, are obliged to conclude that when, upon the record, certiorari is denied and a summary injunction, issued by a United States District Court without presentation of evidence or opportunity for hearing, permitted to stand, the eminent justices of this Court must have proceeded upon an assumption that allegations of petitioners in their suit for damages in Cause No. 87402, in the District Court of Tulsa County, Oklahoma, cannot be sustained by evidence.

For this reason and in support of this, their Petition for Rehearing of the Court's Order Denying Certiorari, petitioners pray leave and permission to deliver herewith to the Clerk for examination and inspection by this Court, photo copies of the registered U. S. Bonds as the same were surrendered for cancellation to that Department as furnished and certified by the Treasury Department of the United States.

Inspection of these bonds will satisfy this Court that said bonds were surrendered and cashed without the signature of the registered owner, but bearing in lieu thereof an "X" purporting to have been witnessed solely by one "F. E. Pence," an agent of Aetna Life Insurance Company.

Together with said photo-copies of the bonds in question, petitioners are delivering also to said Clerk photo copies of the "Vault Entrance Permit" of the First National Bank and Trust Company of Oklahoma City where it is conceded in the record petitioners' testatrix, prior to being stricken, had deposited said bonds in her private safety deposit box for safekeeping. This latter exhibit shows the signature of the registered owner of said bonds, and clearly disposes of any contention that Aetna or F. E. Pence, its agent, was authorized to enter said safety deposit box and take custody and possession of said bonds.

Evidence by deposition of F. E. Pence establishes that he did in truth obtain entrance into said safety deposit box, take possession of said bonds and that it was he who surrendered them in exchange, *not for an annuity insurance policy,* but for negotiable U. S. Bonds which were later by him converted into cash.

Petitioners further, and to demonstrate the confusion and conflict between state and federal courts growing out

of Aetna's injunction from the U. S. District Court for the Northern District of Oklahoma (represented by Aetna as divesting state courts of all power and authority to grant petitioners relief of any character against any defendant in Cause No. 87402 in the District Court of Tulsa County), respectfully invite attention to a certified transcript of record of proceedings occurring on the 12th day of March, 1956, in the County (probate) Court of Creek County, Oklahoma. Said court, sitting in probate, had under consideration the Final Account of the Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, and was engaged in taking evidence. Mr. Robert J. Woolsey, of Tulsa, Oklahoma, an attorney for Aetna in this Court, appeared voluntarily in open court and interrupting proceedings to which Aetna was not a party, and in which Mr. Woolsey was not an attorney, made the following announcement:

> "If the Court please, I am Robert J. Woolsey from Tulsa. I represent the Aetna Life Insurance Company in the Federal Court in Tulsa. Without making an appearance in this case—I am just here as *amicus curiae*, and I just called my office and they informed me that I had just got a wire that the Supreme Court of the United States has denied the Writ of Certiorari of Mr. Young's petition in the interpleader action in the Federal court. That involves the case. I thought I would just make that announcement for the benefit of the parties concerned. * * *"

Aetna in this manner in the state courts, attempts to create an impression that the United States District Court for the Northern District of Oklahoma has assumed and is exercising plenary jurisdiction over the estate and property of petitioners' testatrix, even in probate, and to influence thereby the event of collateral litigation in the state courts.

Examination of the Petition for Certiorari and Reply Brief herein further emphasizes the grave consequences which result from converting a federal court of equity into an asylum for defendants charged with wrong-doing in the state courts.

The Tenth Circuit, in the case at bar, holds that a $462,703.88 suit for actual and punitive damages for the conversion of bonds on October 31, 1950, which was being diligently prosecuted in the State Court, may be summarily and permanently enjoined, in a later federal interpleader suit instituted by the converter, upon the unverified allegation, false upon the face of the converter's complaint, that the suit for conversion is a suit for "the proceeds of" a $162,606.00 annuity policy which policy was not even applied for until November 17, 1950.

The Second Circuit holds there is no federal jurisdiction in interpleader to enjoin prosecution of suits for conversion in the state courts against the complainant "*where the complainant is a wrong-doer as to any of the defendants, or where there is a question to be tried as to whether complainant, by reason of his own act, has rendered himself liable to each of the defendants.*"

—*Mallory S. S. Co.* v. *Thalheim, et al.*, 277 Fed. 196.

Petitioners respectfully submit that under the United States Constitution, the right of a private citizen to prosecute to a conclusion an action for damages for conversion of property in which he asserts an interest should not be summarily abrogated by a federal court of equity without notice, hearing or trial in either the state or federal court.

For the reasons stated, petitioners, conformable to Rule 33, sub-paragraph 2, of this Honorable Court, respectfully pray that rehearing herein be granted and that certiorari

issue by reason of intervening circumstances of substantial or controlling effect and on other substantial grounds, as set forth herein.

Respectfully submitted,

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